No. 15-6418

Title:	Gregory Welch, Petitioner
	v.
	United States
Docketed:	October 6, 2015
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Nos.:	(14-15733)
Decision Date:	June 9, 2015

Questions Presented

---Date---	------Proceedings and Orders----------
Sep 2 2015	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 5, 2015)
Oct 14 2015	Waiver of right of respondent United States to respond filed.
Oct 29 2015	DISTRIBUTED for Conference of November 13, 2015.
Nov 5 2015	Response Requested. (Due December 7, 2015)
Dec 3 2015	Memorandum of respondent United States filed.
Dec 21 2015	Reply of petitioner Gregory Welch filed.
Dec 23 2015	DISTRIBUTED for Conference of January 8, 2016.
Dec 28 2015	Supplemental brief of petitioner Gregory Welch filed. (Distributed)
Jan 8 2016	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jan 15 2016	Helgi C. Walker, Esq., of Washington, D.C., is invited to brief and argue this case, as amicus curiae, in support of the judgment below. Briefs of other amici curiae in support of affirmance are to be filed within 7 days after the filing of the brief of the Court-appointed amicus curiae.
Jan 20 2016	The joint appendix and petitioner's brief on the merits shall be filed on or before February 9, 2016.
Jan 20 2016	Respondent's brief on the merits shall be filed on or before February 9, 2016.
Jan 20 2016	The brief of Court-appointed amicus curiae in support of the judgment below shall be filed on or before March 8, 2016.
Jan 20 2016	Amicus curiae briefs in support of the judgment below are due within 7 days after the filing of the brief of Court-appointed amicus curiae.
Jan 29 2016	SET FOR ARGUMENT ON Wednesday, March 30, 2016
Feb 1 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Feb 2 2016	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the respondent.
Feb 8 2016	Record requested from U.S.C.A. 11th Circuit.
Feb 9 2016	Brief of respondent United States filed.
Feb 9 2016	Brief of petitioner Gregory Welch filed.

Feb 9 2016	Joint appendix filed. (Statement of costs filed.)
Feb 16 2016	Brief amici curiae of The Federal Public and Community Defenders, and the National Association of Federal Defenders filed.
Feb 16 2016	Brief amici curiae of Scholars of Federal Courts and Sentencing filed.
Feb 23 2016	CIRCULATED.
Mar 1 2016	Record received from U.S.D.C. Southern Dist. of Florida is electronic and located on PACER with the exception of the SEALED documents received in 1 envelope.
Mar 8 2016	Brief amicus curiae of Court-appointed amicus curiae in support of the judgment below filed. (Distributed)
Mar 15 2016	Motion for divided argument filed by respondent United States.
Mar 15 2016	Brief amici curiae of Indiana, et al. filed. (Distributed}
Mar 18 2016	Motion for divided argument filed by respondent GRANTED.
Mar 23 2016	Reply of respondent United States filed. (Distributed)
Mar 23 2016	Reply of petitioner Gregory Welch filed. (Distributed)
Mar 30 2016	Argued. For petitioner: Amir H. Ali, Washington, D.C. For respondent in support of vacatur and remand: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D. C. For Court-appointed amicus curiae in support of the judgment below: Helgi C. Walker, Washington, D.C.
Apr 18 2016	Judgment VACATED and case REMANDED. Kennedy, J., delivered the opinion of the Court, in which Roberts, C.J., and Ginsburg, Breyer, Alito, Sotomayor, and Kagan, JJ., joined. Thomas, J., filed a dissenting opinion.
May 20 2016	JUDGMENT ISSUED
Aug 19 2016	Record from U.S.D.C. Southern District of Florida has been returned.

No. 15-6418

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
SEP - 2 2015
OFFICE OF THE CLERK

GREGORY WELCH — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

RECEIVED
OCT 6 - 2015
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[X] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

United States District Court, Southern District Of Florida.

Case No. 09-60212-CR-MARRA Civil Case No. 0.13-CV-62770-MARRA-KAM

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Gregory Welch, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0	$ 0	$ 0	$ 0
Self-employment	$ 0	$ 0	$ 0	$ 0
Income from real property (such as rental income)	$ 0	$ 0	$ 0	$ 0
Interest and dividends	$ 0	$ 0	$ 0	$ 0
Gifts	$ 0	$ 0	$ 0	$ 0
Alimony	$ 0	$ 0	$ 0	$ 0
Child Support	$ 0	$ 0	$ 0	$ 0
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0	$ 0	$ 0
Disability (such as social security, insurance payments)	$ 0	$ 0	$ 0	$ 0
Unemployment payments	$ 0	$ 0	$ 0	$ 0
Public-assistance (such as welfare)	$ 0	$ 0	$ 0	$ 0
Other (specify): _____	$ 0	$ 0	$ 0	$ 0
Total monthly income:	$ 0	$ 0	$ 0	$ 0

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$ N/A
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$ N/A
			$
			$

4. How much cash do you and your spouse have? $ NONE
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
N/A	N/A	$ N/A	$ N/A
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value NONE

☐ Other real estate
Value NONE

☐ Motor Vehicle #1
Year, make & model NONE
Value N/A

☐ Motor Vehicle #2
Year, make & model NONE
Value N/A

☐ Other assets
Description NONE
Value N/A

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
NONE	$ N/A	$ N/A
NONE	$ N/A	$ N/A
NONE	$ N/A	$ N/A

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
N/A	N/A	N/A

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ NONE	$ N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ NONE	$ N/A
Home maintenance (repairs and upkeep)	$ NONE	$ N/A
Food	$ NONE	$ N/A
Clothing	$ NONE	$ N/A
Laundry and dry-cleaning	$ NONE	$ N/A
Medical and dental expenses	$ NONE	$ N/A

	You	Your spouse
Transportation (not including motor vehicle payments)	$ NONE	$ N/A
Recreation, entertainment, newspapers, magazines, etc.	$ NONE	$ N/A
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ NONE	$ N/A
Life	$ NONE	$ N/A
Health	$ NONE	$ N/A
Motor Vehicle	$ NONE	$ N/A
Other: N/A	$ NONE	$ N/A
Taxes (not deducted from wages or included in mortgage payments)		
(specify): N/A	$ NONE	$ N/A
Installment payments		
Motor Vehicle	$ NONE	$ N/A
Credit card(s)	$ NONE	$ N/A
Department store(s)	$ NONE	$ N/A
Other: N/A	$ NONE	$ N/A
Alimony, maintenance, and support paid to others	$ NONE	$ N/A
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ NONE	$ N/A
Other (specify): N/A	$ NONE	$ N/A
Total monthly expenses:	$ NONE	$ N/A

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet. N/A

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? N/A

If yes, state the attorney's name, address, and telephone number:

N/A

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? N/A

If yes, state the person's name, address, and telephone number:

N/A

12. Provide any other information that will help explain why you cannot pay the costs of this case.

This Petitioner has been incarcerated since February 22, 2010.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: Aug 26, 2015

(Signature)

No. 15-6418

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
SEP - 2 2015
OFFICE OF THE CLERK

GREGORY WELCH — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Gregory Welch
(Your Name)

F C I Coleman-Medium
(Address)

P. O. Box 1032, Coleman Florida, 33521
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

I. Whether the District Court was in error when it denied relief on Petitioner's §2255 motion to vacate, which alleged that a prior Florida conviction for "sudden snatching," did not qualify for ACCA enhancement pursuant to 18 U.S.C. §924(e)

II. Whether Johnson v. United States, 135 S. Ct. 2551 (2015), announced a new substantive rule of constitutional law that applies retroactively to cases that are on collateral review. Furthermore, Petitioner ask this Court to resolve the Circuit split which has developed on the question of Johnson retroactivity in the Seventh and the Eleventh Circuit Courts of Appeals.

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at United States v. Welch, 683 F.3d 1304 (11th Cir. 2012)
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was June 9, 2015.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V OF THE CONSTITUTION (DUE PROCESS OF LAW)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor to be deprived of life, liberty, or property, without due process of law;** nor shall private property be taken for public use, without just compensation.

TITLE 18 U.S.C. §924(e) ARMED CAREER CRIMINAL ACT

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in **section** 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25.000 and imprisoned not less than fifteen years, and, not withstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

STATEMENT OF THE CASE

On August 9, 2009, Petiitoner Welch was indicted for possession of firearm by convcited felon, in violation of 18 U.S.C. §922(g) and §924(e). On advice of counsel, Petitioner entered into a written plea agreement on June 18, 2010, for a sentence of 0 - 10 years. See [APPENDIX C]. A Presentence Investigation Report (PSI), was prepared and erroneously found that Petitioner qualified for enhancement under the Armed Career Criminal Act, ("ACCA"), pursuant to §924(e). Petitioner objected to the PSI, asserting that "robbery by sudden snatching," in violation of Florida Statute 813.13(1), did not qualify for enhancement purposes under the ACCA. Petitioner also challenged a felony battery conviction, and a Florida attempted robbery conviction. On advise of counsel, Petitioner withdrew his original plea agreement for 0 - 10 years, and was sentenced to a more severe 15 year mandatory minimum. Petitioner appealed, arguing that roberry by sudden snatching did not qualify as a violent felony predicate under §924(e) (ACCA). The Eleventh Circuit affirmed. [APPENDIX C]

Petitioner next field a timely §2255 motion in which he argued that attempted robbery by sudden snatching, in violation of Flo. Stat. 813.13(1), did not qualify under Descamps v. United States, 133 S. Ct. 2276 (2013). Petitioner's §2255 motion was denied prior to the Supreme Court's ruling in Johnson v. United States, 576 U.S. _____(2015). Petioner's application to the District Court was denied. See [APPENDIX B]. A subsequent application the Eleventh Circuit Court of Appeals also denied. [APPENDIX A] In his C.O.A application, Petitioner asked the Court to hold his case pending the outcome of Johnson v. United States, based on the fact that his case was affirmed under the residual clause. Id.

REASONS FOR GRANTING THE PETITION

I. In 1996, Petitioner plead guilty to the elements of robbery by sudden snatching as it is defined by Florida's Statute 813.131. In Florida, robbery by sudden snatching is defined as follows:

(1) "Robbery by sudden snatching" means the taking of money or other property from a victim's person, with intent to permanently or temporarily deprive the victim or the owner of the money or other perperty, when in the course of the taking, the victim was to became aware of the taking. In order to satisfy this definition, it is not necessary to show that:

(b) The offender used any amount of force beyond that effort necessary to obtain possession of the money or other property. .Fla. Stat. §813.131.

As clearly imdicated above, Fla. Stat. 813.131 does not have as an element, the use or threatened use of physical force against the person of another as required by 18 U.S.C. §924(e)(2)(B)(i). In fact Florida's Statute §813.131 specifically states that it is not necessary to show any amount of use of force beyond what is necessary to obtain the money or property. Therefore, force is not necessary for a conviction under Fla. Stat, 813.131(1)(a).

Furthermore, Robbery by sudden snatching does not meet the criteria of the enumerated offenses in §924(e)(2)(B)(ii), an annunciated in United States v. Begay, 533 U.S. 137 (2008). Petitioner was thus enhanced under the residual clause which has since been held to be unconstitutionally vague by the Supreme Court in Johnson.

Five years ago, on September 20, 2010, Petitioner filed a direct appeal challenging his enhancement under §924(e). The Eleventh Circuit affirmed based on the fact that petitioner's priors were deemed violent under the residual clause. See United States v. Welch, 683 F.3d 1304 (11th Cir 2012), [Appendix C] Certiorari review was denied on January 7, 2013 Welch v. United States, ___ U.S. ____, 133 S. Ct. 913, 184 L. Ed. 2d 702 (2013).

In effort of not waiving or defaulting on any of his constitutional rights, i.e., his Fifth Amendment right to due process of law, Petitioner challenged the erroneous ACCA enhancement in a §2255 motion [CV-DE 72] On December 8, 2014, the District Court denied Petitioner's §2255 moiton [Appendix B], after adopting the Magistrate Judge's Report and Recommendation ("R&R"), which primarily argued that Petitioner was not entitled to relief since the Eleventh Circuit affirmed the District Courts findings. [1] The R&R further stated that Petitioner could not litigate this claim in a collataral proceeding because it was already decided adversly on direct appeal. [CV-DE 17 pp. 9, 28-33].

---

1 During the sentencing hearing on September 17, 2010, the District Court made specific factual findings that Petitioner qualified for ACCA enhancement under the residual clause. At sentencing the Court stated: "I think it meets both test, but if it doesn't meet the -- elements test, I think it meet the residual test." See [CV-DE 55 at pp. 36-37]. Attached hereto as [Appendix D]

Petitioner now ask this Honorable Court to review his claim that his prior conviction under Fla. Stat. 813.131 no longer qualify for enhancement purposes pursuant to 18 U.S.C. §924(e)(2)(B)(ii)'s residual clause. Since the residual clause has been abrogated by Johnson v. United States, Supra. In Johnson, the Court held that the imposition of an enhanced sentence under the residual clause of the ACCA violates due process because the clause is too vague to provide adequate notice. Id., at 2557

Petitioner asserts that it would be a fundamental miscarriage of justice to leave the erroneous enhancement in place when there is no legal statutory provision for it.

JOHNSON SHOULD BE RETROACTIVELY APPLICABLE TO CASES THAT ARE ON COLLATERAL REVIEW

II. On June 26, 2015, the Supreme Court decided Case No. 13-7120, Johnson v. United States, 135 U .S. 2551 (2015). The Johnson decision effectively excise the so-called residual clause from 18 U.S.C. §924(e)(2)(B)(ii), holding that the "clause" was unconstitutionally vague and did not provide adequate notice as required by the Fifth Amendment right to due process. This holding was substantive in nature and "new substantive rules generally apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." Bousley v. United States, 523 U.S. 614, 620 (1998). This is entirely consistent with Teague, which also recognized that new substantive rules

are categorically retroactive. Because of the new substantive rule announced in Johnson, coupled with the "multiple holdings that logocally dictate the retroactivity of the new rule," Tyler v. Cain, 533 U.S. 656, 688, Petitioner asserts that the Supreme Court's Johnson ruling is necessarily and categorically retroactively applicable to cases on collateral review. Id., at 668-69

C E R C U I T S P L I T

After the Supreme Court decided Johnson on June 26, 2015, it did not take long for a circuit split to develop. On July 7, 2015, the Seventh Circuit Court of Appeals decided Price v. United States, Case No. 15-2427, in which it held: "[T]here is no escaping the logical conclusion that the [Supreme] Court itself has made Johnson catagorically retroactive to cases on collateral review."

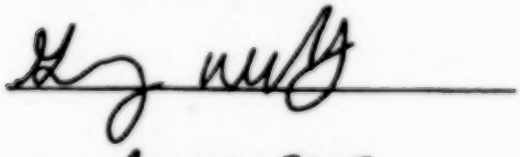
Then in August 2015, the Eleventh Circuit Court of Appeals issued a contrary decision in which it held that: "Johnson did not establish a new rule of constitutional law made retroactive to cases on collateral review by the Supreme court." See In Re: Rivero, Case No. 15-13089-C. (2015).

The above examples serves to illustrate the confusion of Johnson and the retroactive question. therefore Petitioner ask this Court to address the question of retroactivity as it applies to cases on collateral review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: Aug 26, 2015

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-15733-C

GREGORY WELCH,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Gregory Welch moves for a certificate of appealability in order to appeal the denial of his motion to vacate, filed pursuant to 28 U.S.C. § 2255. His motion is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Welch's motion for appointment of counsel is DENIED AS MOOT.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-62770-CIV-MARRA
(09-60212-CR-MARRA)

GREGORY WELCH,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

FINAL JUDGMENT

For the reasons stated in the Report of the Magistrate Judge (DE 17) and upon independent de novo review of the file, and over the objections having been filed (DE 18), it is **ORDERED AND ADJUDGED** as follows:

1) The Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge. The petition to vacate pursuant to 28 U.S.C. § 2255 is **DENIED**.

2) Under Rule 11(a) of the Rules Governing Section 2255 Proceedings in the United States District Courts, this Court must issue or deny a certificate of appealability when entering a final order adverse to the applicant. Because the Court is adopting the Magistrate Judge's Recommendation denying the motion to vacate brought under 28 U.S.C. § 2255, the Court must consider whether to issue or deny the certificate of appealability at this time.

In order for this court to grant a COA, Movant must make a "substantial

showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), such that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further," Slack v. McDaniel, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). The Court concludes under Slack that Movant cannot show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Id. Therefore, the Court **DENIES** a certificate of appealability. The Court notes that under Rule 22(b)(1) of the Federal Rules of Appellate Procedure, Movant may seek a certificate of appealability from the U.S. Court of Appeals for the Eleventh Circuit.

3) All motions not otherwise ruled upon are **DISMISSED AS MOOT**

4) The case is **CLOSED**.

DONE AND ORDERED in chambers at West Palm Beach, Palm Beach County, Florida, this 8th day of December 2014.

KENNETH A. MARRA
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO 13-62770-Civ-MARRA
(09-60212-Cr-MARRA)
MAGISTRATE JUDGE P A. WHITE

GREGORY WELCH,

Movant,

v

UNITED STATES OF AMERICA,

Respondent
_____/

REPORT OF
MAGISTRATE JUDGE

I Introduction

This matter is before this Court on the movant's motion to vacate pursuant to 28 U S.C §2255, challenging the constitutionality of his conviction and sentence for possession of a firearm and ammunition in and affecting interstate and foreign commerce entered following a guilty plea in case no 09-60212-Cr-Marra

This Cause has been referred to the Undersigned for consideration and report pursuant to 28 U.S.C §636(b)(1)(B) and Rules 8 and 10 Governing Section 2255 Cases in the United States District Courts

The Court has reviewed the movant's motion (Cv-DE#1), together with the government's response (Cv-DE#7) to this court's order to show cause with multiple exhibits, the movant's traverse (Cv-DE#15),[1] the Presentence Investigation Report ("PSI"), the court's

[1]The movant's traverse was also filed on CM/ECF at Cv-DE#14, but it has pages missing The complete traverse is docketed on CM/ECF at Cv-DE#15

Statement of Reasons ("SOR"), and all pertinent portions of the underlying criminal file, including the change of plea and sentencing transcripts

Construing the movant's §2255 motion liberally as afforded *pro se* litigants pursuant to Haines v. Kerner, 404 U S 519 (1972), in his motion to vacate (Cv-DE#1), movant challenges the voluntariness of his plea and his ensuing sentence as an armed career criminal Movant alleges he was denied effective assistance of counsel, where his lawyer allowed him to be sentenced as an armed career criminal thereby making his plea not knowing and voluntary (Cv-DE#1:4)

II Factual Background and Procedural History

A. Facts of the Offense[2]

The stipulated factual proffer reveals as follows On March 17, 2009, law enforcement officers searched movant's apartment (Cr-DE#43) At that time, they discovered a loaded Lorcin, Model L380, 380-caliber, semi-automatic pistol, bearing serial number 532504, in the attack space of the apartment (Id.) The firearm was loaded with six rounds of ammunition, five of which were Winchester, 380-caliber ammunition, and one was a Remington, 380-caliber bullet (Id.) Movant further stipulated that the firearm and all of the ammunition had traveled in interstate or foreign commerce (Id.) Next, he agreed that he was a previously convicted felon. (Id.)

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[2]The facts of this case have been obtained from the factual proffer executed by the movant and made part of the Rule 11 change of plea proceeding. (Cr-DE#43:Factual Proffer; Cr-DE#55:Change of Plea/Sentencing Transcript)

B Indictment, Pre-trial Proceedings, Conviction, Sentencing, and Direct Appeal

On August 20, 2009, the movant was charged by Indictment with felon in possession of a firearm and ammunition, in violation of 18 U S C §922(g)(1) [3] (Cr-DE#1; Cv-DE#7:Ex.2) On March 29, 2010, the movant filed a pretrial motion to suppress evidence, arguing that the search was unlawful and the evidence seized as a result therefrom should be suppressed. (Cr-DE#16) Following an evidentiary hearing, the court entered an order denying the motion. (DE#31)

On June 18, 2010, movant entered into a negotiated plea agreement, in which he agreed to plead guilty as charged, acknowledging that the firearm and ammunition were found in his apartment, but preserving his right to appeal the court's denial of his motion to suppress (Cr-DE#54) At that time, the terms of the plea agreement called for a maximum sentence of up to 10 years in prison, for violation of 18 U S C §922(g)(1) (Cr-DE#54:8)

However, on September 8, 2010, movant agreed to vacate his prior plea, and in fact, executed a revised, negotiated written plea agreement, agreeing to plead guilty as charged. (Cr-DE#43) The terms of the agreement were modified in part to reflect movant's agreement and understanding that he faced a minimum of 15 years and up to a maximum of life imprisonment, for violation of §922(g) (Id.:2) The movant acknowledged and understood that the court would impose sentence after considering the advisory

[3]The maximum sentence exposure for being a felon in possession of a firearm, in violation of 18 U.S.C. §922(g)(1), is ten years in prison. However, if a felon in possession has three prior convictions for violent felonies or serious drug offenses, then the Armed Career Criminal Act, 18 U.S.C §924(e), requires a minimum sentence of 15 years imprisonment.

guidelines, based in part on a PSI, which would be prepared after the plea is entered (Id.:2-3) The movant further acknowledged that the court was not bound to impose a guideline sentence, and was permitted to tailor the sentence in light of other statutory concerns, which may be more or less severe than the guidelines (Id.)

Movant understood that the court had the authority to impose up to the statutory maximum authorized by law for the offense of conviction, and that he could not withdraw his plea solely as a result of the sentence imposed. (Id.) In fact, movant understood that the sentence had not yet been determined by the court, and any estimate of the probable sentencing range or ultimate sentence from either defense counsel, the government, or the probation office was a prediction, not a promise, and therefore, not binding on the government, the probation office, or the court (Id.:6-7) He also indicated he had entered into the plea freely and voluntarily, and that no threats or promises, other than as contained in the written agreement, were made to induce him to change his plea to guilty (Id.:7)

Although acknowledging it would not be binding on the probation officer or the court, the parties agreed to jointly recommend up to a three level reduction to movant's base offense level based on his timely acceptance of responsibility (Id :4-5) As part of the modified agreement, the government also consented to the movant's entry of a conditional guilty plea, allowing movant to reserve the right to appeal the denial of his motion to suppress physical evidence (Id.:8)

Movant also stated that there was sufficient evidence to

convict him of the charged offense, as follows (Id.:5-6) On March 17, 2009, his apartment was searched by law enforcement (Id.) At that time, they discovered in the attic space a loaded Lorcin, Model L380, 380-caliber semi-automatic pistol, bearing serial number 532504 (Id.) The firearm contained six rounds of ammunition. (Id.) Five of the rounds were Winchester and one was a Remington. (Id.)

On September 17, 2010, movant appeared for a new change of plea proceeding (Cr-DE#55) At that time, the government explained that when movant initially entered his change of plea in June 2010, neither party had contemplated that the movant qualified as an armed career criminal (Id.:2) As a result, the movant was not advised that his maximum exposure was significantly greater than 10 years (Id.:2-3) As a result, the government stated that the parties had recently executed another written plea agreement similar to the prior agreement (Id.) The new agreement was modified to reflect the fact that movant faced a 15-year minimum mandatory and up to a term of life imprisonment for the charged offense (Id.:3) Further, the modified agreement permitted movant to enter a conditional guilty plea, omitted the appellate waiver contained in the prior agreement, thereby enabling him to appeal the denial of his suppression motion, along with the lawfulness of the sentence to be imposed. (Id.:3) The court then asked defense counsel whether the government's representations were correct, to which counsel responded that the movant potentially faced an enhanced sentence as an armed career criminal, but movant was reserving the right to litigate the validity of the enhancement at sentencing (Id.)

Thereafter, the district court conducted a careful and

meticulous plea colloquy pursuant to Fed.R.Cr.P. 11 (Cr-DE#55) After movant was given the oath, he was cautioned by the court that if he made any false statements during the proceedings, it could be used against him in a prosecution for perjury (Id.:3). Movant then provided background information regarding his age, educational background, and whether he could read and write English. (Id.:4-5)

Movant understood and agreed to set aside his previously entered guilty plea, and to go forward with a new, modified written plea agreement (Id.:6) Movant acknowledged that the new plea agreement allowed him to appeal the sentence imposed, as well as, the court's ruling on movant's motion to suppress (Id.) When asked if, in fact, he wanted to set aside the prior plea, and enter into the new plea agreement, movant responded that he did. (Id.) Movant indicated he had consulted with his attorney about this decision, and they were both in agreement on proceeding with the new plea agreement (Id.) When asked again whether he believed the case should be resolved based on the new agreement with the government, movant indicated that it should. (Id.:8)

Movant further acknowledged reviewing and discussing with counsel the Indictment, along with the government's evidence against him. (Id.:7) He also indicated he discussed possible defenses with counsel, and acknowledged counsel had done more than he had anticipated for him, and had provided more than competent advice (Id.:8) He stated there was nothing further he had wanted done by counsel to defend against the charge (Id.)

Movant testified that he read the new agreement and then fully and completely discussed it with his attorney (Id.:8) He denied any one threatening or forcing him to change his plea from not

guilty to guilty, stating he was doing so freely and voluntarily (Id.:9) Next, again acknowledged the charge against him, as set forth in the Indictment, and further understood that given his criminal history, he may be subject to an enhanced sentence, exposing him to a 15-year minimum and up to a maximum of up to life imprisonment (Id.:10) He acknowledged that the sentence would be imposed after the court considered the advisory guideline sentence, as set forth in the PSI, which had already been prepared. (Id.:11-12) He also acknowledged that after the Rule 11 proceeding, there would be a discussion with the court concerning his disagreement with the contents of the PSI, and in particular, with the recommendation that movant receive an enhanced sentence as an armed career criminal (Id.:12) Movant further understood that his guideline range would be reduced three levels based on his timely acceptance of responsibility (Id.:13) He also acknowledged that the guidelines were not binding or mandatory, and that the court would be able to fashion a sentence above or below the guideline range. (Id.:15-16)

Movant also acknowledged and agreed with the accuracy of the facts as set forth in paragraph 10 of the written plea agreement (Id.:13) He indicated those facts support the charge to which he was pleading guilty (Id.:14) He also acknowledged his agreement to forfeit any claim of ownership or title to the firearm and ammunition seized in connection with the case (Id.)

Notably, movant understood he was entering into a conditional plea because he had reserved the right to appeal the denial of his motion to suppress, along with the lawfulness of the sentence to be imposed. (Id.:14) Movant again denied being made any promises or representations, other than set forth in the plea agreement as to

the ultimate sentence to be imposed. (Id.:16)

Movant acknowledged and understood that by pleading guilty, he was waiving his right to a jury trial and to call witnesses, present evidence, testify on his own behalf, etc (Id.:18-20) Movant further understood that if the court accepted the plea, he would also lose valuable civil liberties, and that the plea could have additional collateral consequences, including deportation, if he were not a United States citizen. (Id.:20) Next, when asked by the court how he wished to plead, movant stated, "Guilty, sir " (Id.:20)

As a result of the foregoing, the court found the movant was fully competent and capable of entering into an informed plea, that he was aware of the nature of the charge and consequences of the plea, that his plea was knowing and voluntary, and supported by an independent basis in fact as to each of the essential elements of the offense. (Id.:21) Thereafter, the court accepted movant's plea, and adjudicated him guilty of the offense charged in the Indictment (Id.)

The PSI prepared for sentencing which reveals as follows The probation officer set the base offense level at 24, pursuant to U S.S.G §2K2 1(a)(4)(A), because the offense of conviction involved possession of a firearm by a convicted felon who had committed the offense of conviction after having at least two prior felony convictions of crimes of violence. (PSI ¶15) However, the base offense level was then increased to a level 33 because the movant was subject to an enhanced sentence, pursuant to U S S.G. §4B1 4(a), as an armed career criminal (PSI ¶21) Three levels were deducted from the base offense level based on movant's timely

acceptance of responsibility, resulting in a total adjusted offense level 30 (PSI ¶¶21-24)

Next, the probation officer determined movant had a total of 14 criminal history points, resulting in a criminal history category VI (PSI ¶¶40-41) The criminal history category remained the same even with the armed career criminal enhancement, pursuant to U S S.G. §4B1 4(c)(3) (PSI ¶42) Based on a total offense level 30 and a criminal history category VI, at the low end, movant's total advisory guideline exposure was 168 to 210 months in prison. (PSI ¶86; Cr-DE#55:22) However, statutorily, movant was facing a minimum mandatory term of imprisonment of 180 months in prison (Cr-DE#55:22)

Defense counsel, having previously filed objections to the PSI's determination that movant qualified for an enhanced sentence as an armed career criminal (Cr-DE#s37-40), renewed the objections at sentencing (Cr-DE#55:23-40) After considering the statement of all parties, the PSI containing the advisory guidelines, along with the 18 U S.C §3553(a) statutory factors, the court sentenced petitioner to the statutory minimum mandatory term of 180 months imprisonment, to be followed by a term of 3 years supervised release (Cr-DE#55:39-40; Cr-DE#45)

Movant appealed, challenging the denial of his motion to suppress, as well as, the constitutionality of his enhanced sentence as an armed career criminal See United States v. Welch, 683 F 3d 1304 (11th Cir 2012); (Cr-DE#69) On June 13, 2012, the Eleventh Circuit *per curiam* affirmed the denial of the suppression motion, along with the enhanced sentence, in a published opinion. United States v. Welch, supra. Certiorari review was denied on

January 7, 2013 Welch v. United States, __ U S ___, 133 S Ct 913, 184 L.Ed.2d 702 (2013); (Cr-DE#71)

For purposes of the federal one-year limitations period, the judgment of conviction in the underlying criminal case became final at the latest on **January 7, 2013,** when certiorari review was denied by the United States Supreme Court [4] Less than one year later, the movant returned to this court filing the instant motion to vacate with supporting memorandum, pursuant to 28 U S C. §2255, on **December 9, 2013.**[5] (Cv-DE#s1,2)

III Standard of Review

Pursuant to 28 U S.C §2255, a prisoner in federal custody may move the court which imposed sentence to vacate, set aside or correct the sentence if it was imposed in violation of federal constitutional or statutory law, was imposed without proper jurisdiction, is in excess of the maximum authorized by law, or is

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[4]The Supreme Court has stated that a conviction is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); accord, United States v. Kaufman, 282 F.3d 1336 (11th Cir 2002) Once a judgment is entered by a United States court of appeals, a petition for writ of certiorari must be filed within 90 days of the date of entry The 90 day time period runs from the date of entry of the judgment rather than the issuance of a mandate. Sup.Ct.R. 13; see also, Close v. United States, 336 F.3d 1283 (11th Cir 2003)

[5]The §2255 and supporting memorandum are neither signed nor dated Although the exact date it was mailed cannot be determined, the undersigned has utilized the Clerk's receipt date for purposes of the filing date. It is worth noting that due to lack of verification, the motion, as currently filed, is subject to dismissal. See Rule 2(b)(5) of the Rules Governing §2255 Proceedings in District Courts. Since movant cannot prevail on any of the claims presented, the undersigned has addressed the merits of the claims in the alternative. By separate order, the undersigned has directed movant to verify the §2255 motion under penalty of perjury His failure to do so prior to the district court's consideration of this Report and ensuing Order may result in dismissal of this action on that basis, in the alternative.

otherwise subject to collateral attack. 28 U S C §2255 In determining whether to vacate a movant's sentence, a district court must first determine whether a movant's claim is cognizable under Section 2255 See Lynn v. United States, 365 F 3d 1225, 1232-33 (11th Cir 2004)(stating that a determination of whether a claimed error is cognizable in a Section 2255 proceeding is a "threshold inquiry"), cert. den'd, 543 U S 891, 125 S Ct 167, 160 L. Ed. 2d 154 (2004) It is well-established that a Section 2255 motion may not be a substitute for a direct appeal Id. at 1232 (citing United States v. Frady, 456 U.S 152, 165, 102 S Ct. 1584, 1593, 71 L.Ed.2d 816 (1982))

The Eleventh Circuit promulgated a two-part inquiry that a district court must consider before determining whether a movant's claim is cognizable First, a district court must find that "a defendant must assert all available claims on direct appeal " Lynn, supra (citing Mills v. United States, 36 F 3d 1052, 1055 (11th Cir 1994)) Second, a district court must consider whether the type of relief the movant seeks is appropriate under Section 2255 This is because "[r]elief under 28 U S.C §2255 is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice." Lynn, 365 F 3d at 1232-33 (quoting Richards v. United States, 837 F 2d 965, 966 (11th Cir 1988)(internal quotations omitted))

If a court finds a claim under Section 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U S C §2255 To obtain

this relief on collateral review, a petitioner must "clear a significantly higher hurdle than would exist on direct appeal " Frady, 456 U S at 166, 102 S.Ct at 1584 (rejecting the plain error standard as not sufficiently deferential to a final judgment

Under Section 2255, unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," the court shall "grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." However, "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing " Schriro v. Landrigan, 550 U S 465, 474, 127 S Ct 1933, 1940, 167 L.Ed.2d 836 (2007) See also Aron v. United States, 291 F 3d 708, 715 (11th Cir 2002)(explaining that no evidentiary hearing is needed when a petitioner's claims are "affirmatively contradicted by the record" or "patently frivolous") As indicated by the discussion below, the motion and the files and records of the case conclusively show that movant is entitled to no relief, therefore, no evidentiary hearing is warranted

In addition, the party challenging the sentence has the burden of showing that it is unreasonable in light of the record and the §3553(a) factors United States v. Talley, 431 F 3d 784, 788 (11th Cir 2005) The Eleventh Circuit recognizes "that there is a range of reasonable sentences from which the district court may choose," and ordinarily expect a sentence within the defendant's advisory guideline range to be reasonable Id.

A. Guilty Plea Principles

It is well settled that before a trial judge can accept a guilty plea, the defendant must be advised of the various constitutional rights that he is waiving by entering such a plea Boykin v. Alabama, 395 U S 238, 243 (1969) Since a guilty plea is a waiver of substantial constitutional rights, it must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences surrounding the plea Brady v. United States, 397 U S 742, 748 (1970) See also United States v. Ruiz, 536 U S 622, 629 (2002); Hill v. Lockhart, 474 U S 52, 56 (1985); Henderson v. Morgan, 426 U S 637, 645 n 13 (1976) To be voluntary and knowing, (1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of his guilty plea. United States v. Moriarty, 429 F 3d 1012, 1019 (11th Cir 2005); United States v. Mosley, 173 F 3d 1318, 1322 (11th Cir 1999)

After a criminal defendant has pleaded guilty, he may not raise claims relating to the alleged deprivation of constitutional rights occurring prior to the entry of the guilty plea, but may only raise jurisdictional issues, United States v. Patti, 337 F 3d 1317, 1320 (11th Cir 2003), cert. den'd, 540 U S 1149 (2004), attack the voluntary and knowing character of the guilty plea, Tollett v. Henderson, 411 U S 258, 267 (1973); Wilson v. United States, 962 F 2d 996, 997 (11th Cir 1992), or challenge the constitutional effectiveness of the assistance he received from his attorney in deciding to plead guilty, United States v. Fairchild, 803 F 2d 1121, 1123 (11th Cir 1986) To determine that a guilty plea is knowing and voluntary, a district court must comply with

Rule 11 and address its three core concerns: "ensuring that a defendant (1) enters his guilty plea free from coercion, (2) understands the nature of the charges, and (3) understands the consequences of his plea." Id.; see also, United States v. Frye, 402 F 3d 1123, 1127 (11th Cir 2005)(*per curiam*); United States v. Moriarty, 429 F 3d 1012 (11th Cir 2005) [6]

In other words, a voluntary and intelligent plea of guilty made by an accused person must therefore stand unless induced by misrepresentations made to the accused person by the court, prosecutor, or his own counsel Brady v. United States, 397 U S 742, 748 (1970) If a guilty plea is induced through threats, misrepresentations, or improper promises, the defendant cannot be said to have been fully apprised of the consequences of the guilty plea and may then challenge the guilty plea under the Due Process Clause See Santobello v. New York, 404 U S 257 (1971)

B. Ineffective Assistance of Counsel Principles

Because the movant suggests in the motion that counsel rendered ineffective assistance, this Court's analysis begins with the familiar rule that the Sixth Amendment affords a criminal

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[6] In Moriarty, the Eleventh Circuit specifically held as follows:

> [t]o ensure compliance with the third core concern, Rule 11(b)(1) provides a list of rights and other relevant matters about which the court is required to inform the defendant prior to accepting a guilty plea, including: the right to plead not guilty (or persist in such a plea) and to be represented by counsel; the possibility of forfeiture; the court's authority to order restitution and its obligation to apply the Guidelines; and the Government's right, in a prosecution for perjury, to use against the defendant any statement that he gives under oath.

Id.

defendant the right to "the Assistance of Counsel for his defense " U S CONST amend. VI To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must demonstrate both (1) that counsel's performance was deficient, and (2) a reasonable probability that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U S 668, 687, 694 (1984); Harrington v. Richter, ___ U S ___, 131 S.Ct 770, 788 (2011) See also Premo v. Moore, ___ U S ___, 131 S.Ct 733, 739-740 (2011); Padilla v. Kentucky, 559 U S 356, 367, 130 S Ct 1473, 1482, 176 L Ed.2d 284 (2010) If the movant cannot meet one of Strickland's prongs, the court does not need to address the other prong. Strickland, 466 U S at 697, 104 S Ct 2069 (explaining a court need not address both prongs of Strickland if the defendant makes an insufficient showing on one of the prongs) See also Butcher v. United States, 368 F 3d 1290, 1293 (11th Cir 2004); Brown v. United States, 720 F 3d 1316 (11th Cir 2013)

To show counsel's performance was unreasonable, a defendant must establish that "no competent counsel would have taken the action that his counsel did take " Gordon v. United States, 518 F 3d 1291, 1301 (11th Cir 2008)(citations omitted); Chandler v. United States, 218 F 3d 1305, 1315 (11th Cir 2000) With regard to the prejudice requirement, the movant must establish that, but for counsel's deficient performance, the outcome of the proceeding would have been different Strickland, 466 U.S at 694 For the court to focus merely on "outcome determination," however, is insufficient; "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." Lockhart v. Fretwell, 506 U S 364, 369-70, 113 S Ct 838, 122 L.Ed.2d 180 (1993); Allen v. Sec'y, Fla. Dep't of Corr's,

611 F 3d 740, 754 (11th Cir 2010) A defendant therefore must establish "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Lockhart, 506 U S at 369 (quoting Strickland, 466 U S at 687)

In the context of a guilty plea, the first prong of Strickland requires petitioner to show his/her plea was not voluntary because he/she received advice from counsel that was not within the range of competence demanded of attorneys in criminal cases, while the second prong requires petitioner to show a reasonable probability that, but for counsel's errors, he/she would have entered a different plea Hill, 474 U S at 56-59 If the petitioner cannot meet one of Strickland's prongs, the court does not need to address the other prong Dingle v. Sec'y for Dep't of Corr's, 480 F 3d 1092, 1100 (11th Cir), cert. den'd, 552 U S 990 (2007); Holladay v. Haley, 209 F 3d 1243, 1248 (11th Cir), reh'g and reh'g en banc den'd by, Holladay v. Haley, 232 F 3d 217 (11th Cir), cert. den'd, 531 U.S 1017 (2000)

However, a defendant's sworn answers during a plea colloquy must mean something Consequently, a defendant's sworn representations, as well as representation of his/her lawyer and the prosecutor, and any findings by the judge in accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings " Blackledge v. Allison, 431 U S 63, 73-74 (1977); United States v. Medlock, 12 F 3d 185, 187 (11th Cir), cert. den'd, 513 U.S 864 (1994); United States v. Niles, ___ F 3d ___, 2014 WL 1876276 (11th Cir May 12, 2014)(unpublished) [7]

[7] "Unpublished opinion are not considered binding precedent, but they may be cited as persuasive authority " 11th Cir R. 36-2 The Court notes this same rule applies to other Fed. Appx. cases cited herein.

A criminal defendant is bound by his/her sworn assertions and cannot rely on representations of counsel which are contrary to the advice given by the judge. See Scheele v. State, 953 So 2d 782, 785 (Fla 4 DCA 2007) ("A plea conference is not a meaningless charade to be manipulated willy-nilly after the fact; it is a formal ceremony, under oath, memorializing a crossroads in the case. What is said and done at a plea conference carries consequences "); Iacono v. State, 930 So 2d 829 (Fla. 4 DCA 2006) (holding that defendant is bound by his sworn answers during the plea colloquy and may not later assert that he committed perjury during the colloquy because his attorney told him to lie); United States v. Rogers, 848 F 2d 166, 168 (11th Cir 1988) ("[W]hen a defendant makes statements under oath at a plea colloquy, he bears a heavy burden to show his statements were false.")

Moreover, in the case of alleged sentencing errors, the movant must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been less harsh due to a reduction in the defendant's offense level Glover v. United States, 531 U S. 198, 203-04, 121 S.Ct 696, 148 L.Ed.2d 604 (2001) A significant increase in sentence is not required to establish prejudice, as "any amount of actual jail time has Sixth Amendment significance." Id. at 203

Furthermore, a §2255 movant must provide factual support for his contentions regarding counsel's performance Smith v. White, 815 F 2d 1401, 1406-07 (11th Cir 1987) Bare, conclusory allegations of ineffective assistance are insufficient to satisfy the Strickland test See Boyd v. Comm'r, Ala. Dep't of Corr's, 697 F 3d 1320, 1333-34 (11th Cir 2012); Garcia v. United States, 456 Fed.Appx. 804, 807 (11th Cir 2012) (citing Yeck v. Goodwin, 985

F 2d 538, 542 (11th Cir 1993)); Wilson v. United States, 962 F 2d 996, 998 (11th Cir 1992); Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir 1991), cert. den'd Tejada v. Singletary, 502 U.S 1105 (1992); Stano v. Dugger, 901 F 2d 898, 899 (11th Cir 1990) (citing Blackledge v. Allison, 431 U S 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)); United States v. Ross, 147 Fed.Appx. 936, 939 (11th Cir 2005)

Finally, the Eleventh Circuit has recognized that given the principles and presumptions set forth above, "the cases in which habeas petitioners can properly prevail are few and far between." Chandler, 218 F 3d at 1313 This is because the test is not what the best lawyers would have done or even what most good lawyers would have done, but rather whether some reasonable lawyer could have acted in the circumstances as defense counsel acted. Dingle, 480 F 3d at 1099; Williamson v. Moore, 221 F 3d 1177, 1180 (11th Cir 2000) "Even if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was 'so patently unreasonable that no competent attorney would have chosen it '" Dingle, 480 F 3d at 1099 (quoting Adams v. Wainwright, 709 F 2d 1443, 1445 (11th Cir 1983)) The Sixth Circuit has framed the question as not whether counsel was inadequate, but rather counsel's performance was so manifestly ineffective that "defeat was snatched from the hands of probable victory " United States v. Morrow, 977 F 2d 222, 229 (6th Cir 1992)

IV Threshold Issues

The government concedes that this federal proceeding was instituted less than a year after movant's conviction became final

(Cv-DE#9) As will be recalled, movant's conviction became final at the latest on **January 7, 2013**, when certiorari review was finally denied by the United States Supreme Court For purposes of the AEDPA's one-year federal limitations period, the movant was required to file this motion to vacate within one year from the time the judgment became final, or no later than **January 7, 2014.** See Griffith v. Kentucky, 479 U S. 314, 321, n.6 (1986); see also, See Downs v. McNeil, 520 F 3d 1311, 1318 (11th Cir 2008)(citing Ferreira v. Sec'y, Dep't of Corr's, 494 F 3d 1286, 1289 n.1 (11th Cir 2007)(this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); accord United States v. Hurst, 322 F 3d 1256, 1260-61 (10th Cir 2003); United States v. Marcello, 212 F 3d 1005, 1008-09 (7th Cir 2000)) Pursuant to the mailbox rule, movant's motion was filed on **December 9, 2013,** less than a year after his conviction became final Therefore the government's argument is correct and this federal petition is not time-barred.

V Discussion

In this federal habeas petition, movant argues that his guilty plea was not knowing and voluntary because his lawyer failed to inform him that he would be subject to an enhanced sentence as an armed career criminal (Cv-DE#1; Cv-DE#2:2) He claims that but for counsel's deficiency, he would not have accepted the 15-year plea and would have proceeded to trial (Cv-DE#2:Memo:2) Petitioner concedes he was told at the second change of plea proceeding that he was "potentially being considered as an armed career offender," but maintains he was not told that he did, in fact, qualify for such an enhancement (Id.) He maintains he told counsel he did not

want to go through with accepting the second plea offer, but counsel coerced and/or otherwise verbally forced him into doing so (Id.:3) According to petitioner, knowledge of his status as an armed career criminal did not come to the government and defense counsel s attention until after he accepted the first plea and was debriefed by the government (Id.) He claims that, had he known the government would utilize his debriefing to enhance his sentence, he would never have negotiated a plea (Id.) Lastly, movant suggests that the prior convictions used to support his enhanced sentence violate the Supreme Court's decisions in Begay and Descamps (Id.:4).. Finally, movant suggests that had he proceeded to trial, he only faced a total guideline sentencing range of 51 to 63 months in prison (Id.:6) Of course, his calculations are mistakenly premised on a sentencing range without the armed career criminal enhancement (Id.)

A. Voluntariness of Plea

As previously narrated, movant pleaded guilty to being a felon in possession of a firearm and ammunition. His claims challenging counsel effectiveness leading up to and resulting in the Rule 11 change of plea proceeding are clearly refuted by the record, and/or otherwise waived due to the entry of a knowing and voluntary plea

The law is clear that a movant waives or more accurately, forfeits his right to contest all nonjurisdictional defects and defenses, when he enters a knowing and voluntary guilty plea See United States v. Broce, 488 U S 563 (1989); McMann v. Richardson, 397 U S 759 (1970) (voluntary guilty plea waives all non-jurisdictional defects); United States v. De La Garza, 516 F 3d 1266, 1271 (11th Cir 2008), quoting, Wilson v. United States, 962

F 2d 996 (11th Cir 1992)(claim of ineffective assistance of counsel relating to pre-plea issues waived by voluntary guilty plea); McCoy v. Wainwright, 804 F 2d 1196, 1198 (11th Cir 1986)(voluntary guilty plea waives all non-jurisdictional defects); see also, United States v. Glinsey, 209 F 3d 386, 392 (5th Cir 2000), citing, United States v. Smallwood, 920 F 2d 1231, 1240 (5th Cir 1991); Smith v. United States, 447 F 2d 487, 488 (5th Cir 1971), citing, Hayes v. Smith, 447 F 2d 488 (5th Cir 1971) "This includes claims of ineffective assistance of counsel except insofar as the ineffectiveness is alleged to have rendered the guilty plea involuntary " United States v. Glinsey, 209 F 3d at 392

In this case, review of the record confirms that the movant's plea was knowing and voluntary, and therefore, the movant has waived any defenses he may have had prior thereto to the charged conduct See United States v. Moriarty, 429 F 3d 1012, 1019 (2005) The transcript of the change of plea proceedings confirms that the court conducted a thorough Rule 11 proceeding In pertinent part, the movant acknowledged under oath that he was satisfied with counsel's representation, that he discussed the charges and the evidence with counsel, as well as, possible defenses prior to the change of plea Movant also acknowledged the rights he was waiving by entering into the plea, and further denied being forced, or otherwise coerced by counsel or anyone into changing his plea

It is also evident that the movant understood the facts and the elements of the offense upon which the charge rested. Moreover, by way of entering into the negotiated plea agreement, the movant was telling his lawyer not to conduct any further investigation and not present at a pre-trial or trial proceeding any legal defenses, that he may be entitled to as it related to his case More

importantly to the issue of his enhanced sentence, movant acknowledged he was facing a 15-year minimum and up to a term of life imprisonment based on the offense of conviction. Under these circumstances, no showing has been made that the plea was anything but knowing and voluntary It further bears mentioning that movant's suggestion that he was forced and/or otherwise coerced by counsel to change his plea is clearly refuted by the record.

Thus, where movant swore under penalty of perjury at the change of plea proceeding that no one had threatened, coerced, or forced him into entering a guilty plea, there is a strong presumption that his representations are true. United States v. Medlock, 12 F 3d 185, 187 (11th Cir 1994); see also United States v. Rogers, 848 F 2d 166, 168 (11th Cir 1988) ("[W]hen a defendant makes statements under oath at a plea colloquy, he bears a heavy burden to show his statements were false ")

As a result, even if counsel the defense and the government were unaware early on, when the first Rule 11 proceeding was conducted, that movant was facing an enhanced sentence as an armed career criminal, certainly by the time the knowing and voluntary second plea proceeding was concluded, movant was aware he was facing such a sentence exposure He further acknowledged exploring the issue with counsel In fact, contrary to the movant's arguments here, counsel did in fact argue against the enhanced sentence. Specifically, defense counsel argued that the prior state court convictions did not qualify as prior crimes of violence for purposes of the armed career criminal enhancement Therefore, they could not be utilized as predicate offenses Under these circumstances, movant has not demonstrated that any that further argument, as suggested movant here, would have resulted in a lesser

sentence In other words, a sentence without the enhancement As a result, he cannot satisfy the prejudice prong under Strickland and is thus entitled to no relief on this claim. See United States v. Ross, 143 Fed.Appx. 936 (11th Cir 2005) ("the district court was within its authority to discredit any allegations that Ross's counsel was ineffective which were contrary to the statements he made under oath at the plea hearing")

Moreover, movant has not overcome the presumption that his statements under oath at the Rule 11 proceeding were true and correct See generally United States v. Clayton, 447 Fed.Appx. 65 (11th Cir 2011) (defendant received close assistance of counsel where, during plea colloquy, defendant "confirmed that he had discussed the charges, plea agreement, and guidelines with his lawyer, had been given adequate time to consult with his lawyer, and was satisfied with his lawyer's representation," and had not "overcome the strong presumption that statements made during the plea colloquy are true"); United States v. Price, 139 Fed.Appx. 253 (11th Cir 2005) (no abuse of discretion in denying motion to withdraw guilty plea where plea hearing transcript "makes clear that the district court went through Price's rights with him, that Price understood those rights, that Price was satisfied with his counsel, and that—despite any factual disputes—Price persisted in pleading guilty" and where hearing transcript included defendant's confirmation "that he had consulted his counsel about how to proceed and that he had been 'extremely' satisfied with his counsel's representation")

To the extent movant means to argue that his plea was not knowing and voluntary because it was premised on counsel's misadvice regarding his sentence exposure, that claim also warrants

no relief Even if this Court were to accept as true movant's allegations that before he entered the second plea, defense counsel somehow led him to believe he would not face an enhanced sentence as an armed career criminal, it cannot be said that such representation was either coercive or that it unduly influenced movant's decision First, an erroneous estimation of the guidelines does not entitle movant to relief in that "[a]n erroneous estimate by counsel as to the length of sentence" is not "necessarily indicative of ineffective assistance " Beckham v. Wainwright, 639 F 2d 262, 265 (5th Cir 1981) [8] Even when an attorney erroneously estimates his client's potential sentence, the movant must satisfy the prejudice requirement of Strickland by showing that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial " Hill, 474 U S at 59, 106 S Ct at 370; United States v. Stumpf, 827 F 2d 1027, 1030 (5th Cir 1987); see also, United States v. Pease, 240 F 3d 938, 940-42 (11th Cir 2001)(rejecting argument by defendant sentenced as a career offender that her plea was not knowing and voluntary because he had relied on counsel's prediction that her potential sentence under the plea agreement would be anywhere from five to ten years); Carranza v. United States, 508 Fed.Appx 873 (11th Cir 2013); United States v. Aryanitis, 902 F 2d 489, 494-95 (7th Cir 1990)(no ineffective assistance where claim based only on inaccurate prediction of sentence)

The movant acknowledged during the second Rule 11 proceeding that, pursuant to the applicable statute, he was facing a 15-year

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[8]The Eleventh Circuit has adopted as binding precedent all decisions of the former Fifth Circuit rendered before October 1, 1981, and all Fifth Circuit Unit B decisions rendered after October 1, 1981 Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir 1981)

minimum mandatory as an armed career criminal, and up to a maximum of life in prison He also acknowledged that the court would consider the advisory guideline range, and that movant would be unable to withdraw his plea as a result of the sentence imposed. Movant indicated that he understood the possible sentence he could receive, denied being promised anything, other than as set forth in the newly modified written plea agreement, to induce him to change his plea, and denied being threatened or otherwise forced to plead guilty The law is clear that a defendant's sworn representations, along with the representations of his lawyer and the prosecutor, and any findings by the judge in accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings " Blackledge, 431 U S at 73-74 See also United States v. Lemaster, 403 F 3d 216, 221-222 (4th Cir 2005)("[I]n the absence of extraordinary circumstances, the truth of sworn statements made during a Rule 11 colloquy is conclusively established, and a district court should, without holding an evidentiary hearing, dismiss any §2255 motion that necessarily relies on allegations that contradict the sworn statements ")

It bears noting that "[A]s a matter of public policy, no court should tolerate a claim of this kind, wherein the movant literally suggests in his §2255 filings that he lied during the Rule 11 hearing," "[N]or should such a movant find succor in claiming" as movant does here, that "my lawyer told me to lie" or otherwise threatened/coerced him into doing so See Gaddis v. United States, 2009 WL 1269234, *5 (S.D.Ga 2009) (unpublished) In his form §2255, in accordance with 28 U S C §1746(1), movant declared "under penalty of perjury," that the claim(s) were true and correct (Cv-DE#2:14) As noted previously in this Report, movant is now claiming in this proceeding that she was coerced to testify as she

did during her change of plea proceeding before the district court So, he was lying under oath at that time, or is lying under oath now "[S]uch casual lying enables double-waivered, guilty-plea convicts to feel far too comfortable filing otherwise doomed §2255 motions that consume public resources " See Irick v. United States, 2009 WL 2992562 at *2 (S.D. Ga. Sept 17, 2009) However, the Undersigned takes no position on whether the government should "consider investigating the movant for perjury " See Irick v. United States, supra; see also, Rivera v. Allin, 144 F 3d 719, 731 (11th Cir 1998) (district court did not abuse its discretion by dismissing an action without prejudice where plaintiff "had lied under penalty of perjury about the existence of a prior lawsuit"), abrogated on other grounds by Jones v. Bock, 549 U S 199, 127 S.Ct 910, 166 L.Ed.2d 798 (2007)

Here, movant has not shown a reasonable probability that he was coerced, forced, or otherwise unlawfully induced to enter his plea. To the contrary his allegations are directly refuted by the Rule 11 representations made by him under oath. Thus, he cannot now contend that his guilty plea was in reliance upon some alternative characterization of his sentence exposure or advice given to him by his counsel His self-serving statements that he was misadvised by counsel regarding his sentence exposure is wholly conclusory with no support whatever in the record, not to mention incredible [9]

Further, even if we assume, without deciding, that before the

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[9] See generally United States v. Jones, 614 F.2d 80, 81-82 (5th Cir 1980)(district court justified in dismissing section 2255 movant's claims when movant presented only conclusory allegations to support claims) See also Tejada v. Dugger, 941 F 2d 1551, 1559 (11th Cir 1991)(recognizing that a petitioner is not entitled to habeas relief "when his claims are merely 'conclusory allegations unsupported by specifics' or 'contentions that in the face of the record are wholly incredible'" (citation omitted))

plea proceeding it was in some way conveyed to movant that he was to receive a particular lesser sentence as he suggests here, movant's reliance on his attorney's erroneous prediction of a more lenient sentence is not sufficient to render a guilty plea involuntary See Stumpf, 827 at 1030 See also United States v. Harmon, 139 F 3d 899 (5th Cir 1998)(finding that the defendant could not "claim that his guilty plea was involuntary based upon his attorney's erroneous prediction about the length of the sentence") As the Fifth Circuit explained in Daniel v. Cockrell, 283 F 3d 697 (5th Cir 2002):

> A guilty plea is not rendered involuntary by the defendant's mere subjective understanding that he would receive a lesser sentence. In other words, if the defendant's expectation of a lesser sentence did not result from a promise or guarantee by the court, the prosecutor or defense counsel, the guilty plea stands Likewise, a guilty plea is not rendered involuntary because the defendant's misunderstanding was based on defense counsel's inaccurate prediction that a lesser sentence would be imposed.

Daniel, 283 F 3d at 703

It also cannot be overlooked that the entry of the guilty plea was clearly in the best interest of the movant Because of the plea negotiated by defense counsel, movant benefitted from a three level reduction to his base offense level for acceptance of responsibility Had he proceeded to trial and been found guilty, movant's exposure upon conviction may have been significantly greater He also may not have been eligible for a reduction in his guideline range based on acceptance of responsibility On the record before this court, movant has not demonstrated here that but for counsel's errors, he would not have pled guilty but would have gone to trial Hill, 474 U S at 56-59 His suggestion at this

juncture is wholly incredible and therefore rejected

In conclusion, the record reveals that movant is not entitled to relief on any of the arguments presented as it is apparent from the extensive review of the record above that movant's guilty plea was entered freely, voluntarily and knowingly with the advice received from competent counsel and not involuntarily and/or unknowingly entered, as now claimed by him. See Boykin v. Alabama, 395 U S 238, 243 (1969); Brady v. United States, 397 U.S 742, 748 (1970) [10] See also Hill v. Lockhart, supra; Strickland v. Washington, supra 466 U S 668 (1984) Further, as noted above, his enhanced sentence as an career criminal was proper Therefore, no showing has been made that any further argument in this regard during the penalty phase of his case would have resulted in a different outcome, i.e., a lower sentence.

Moreover, it bears noting that movant challenged the lawfulness of his enhanced sentence as an armed career criminal on appeal See United States v. Welch, supra; (Cr-DE#69) The Eleventh Circuit affirmed the district court's finding, ruling in part pertinent that movant's prior robbery conviction qualified as a predicate offense for purposes of the enhancement (Id.)

Consequently, the challenge of his sentence in this collateral proceeding, albeit expanding on the argument that his status as an

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[10]It is well settled that before a trial judge can accept a guilty plea, the defendant must be advised of the various constitutional rights that he is waiving by entering such a plea, Boykin v. Alabama, 395 U.S 238, 243 (1969) Since a guilty plea is a waiver of substantial constitutional rights, it must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences surrounding the plea. Brady v. United States, 397 U.S 742, 748 (1970) A voluntary and intelligent plea of guilty made by an accused person who has been advised by competent counsel may not be collaterally attacked. Mabry v. Johnson, 467 U.S 504, 508 (1984)

armed criminal career criminal is unlawful, presented in the guise of an ineffective assistance of counsel, adds nothing of substance to warrant reconsideration of the issue here. See United States v. Nyhuis, 211 F 3d 1340, 1343 (11th Cir. 2000)("Once a matter has been decided adversely to a defendant on direct appeal it cannot be re-litigated in a collateral attack under section 2255 ")(internal marks, citation and footnote omitted); Mills v. United States, 36 F 3d 1052, 1056 (11th Cir 1994)(*per curiam*)("[P]rior disposition of a ground of error on direct appeal, in most cases, precludes further review in a subsequent collateral proceeding "); United States v. Rowan, 663 F 2d 1034, 1035 (11th Cir 1981)(*per curiam*)("This Court is not required on § 2255 motions to reconsider claims of error raised and disposed of on direct appeal ") Couching his claim in the guise of an ineffective-assistance-of-counsel claim in this §2255 proceeding adds nothing of substance which would justify a different result See Nyhuis, 211 F 3d at 1343 (defendant was not entitled to collateral relief based on due process claim that was mere re-characterization of double jeopardy and immunity claim that was rejected on direct appeal)(citation omitted)

Stated differently, a claim rejected on direct appeal does not merit rehearing on a different legal theory Nyhuis, 211 F 3d at 1343, citing, Cook v. Lockhart, 878 F 2d 220, 222 (8th Cir 1989) Also, movant has failed to establish prejudice pursuant to Strickland arising from counsel's failure to pursue this argument at sentencing and/or on appeal He is thus entitled to no relief on this claim.

B Challenge to Armed Career Criminal Sentence

Alternatively, it appears movant argues a free standing claim that he is entitled to vacatur of his conviction and sentence based on the Supreme Court's recent decisions in Alleyne v. United States, 133 S Ct 2151 (2013) and Descamps v. United States,[11] ___ U S ____, 133 S Ct 2276 (2013) on the basis that the district court, and not the jury, made factual determinations regarding movant's enhanced sentence. He suggests counsel should have anticipated these arguments (Cv-DE#2; Cv-DE#7)

These decisions are the latest edition to the progeny of the Supreme Court's decision in Apprendi v. New Jersey, 520 U S 466 (2010),[12] in which the Supreme Court held that "[o]ther than the

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[11]In Descamps, the defendant was convicted of possession of a firearm by a convicted felon and sentenced under the Armed Career Criminal Act ("ACCA"), based in part on his prior burglary conviction under California law. Descamps involved application of the "residual clause" of the ACCA, §924(e)(2)(B)(ii), which defines "violent felony" as "burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another " 18 U.S.C §924(e)(2)(B)(ii) The California burglary statute did not include an element of the generic crime of burglary; it did not require that a burglar "enter or remain unlawfully in a building " The Supreme Court held that federal sentencing courts may not apply the "modified categorical approach" (meaning, consulting a limited class of documents, such indictments and jury instructions) to sentencing under ACCA's "residual clause" when the state crime of which the defendant was convicted has a single, indivisible set of elements (meaning, the statute did not contain alternative elements) Descamps, ___ U.S. ____. 133 S.Ct. at 2281-82.

[12]The Eleventh Circuit has held that cases such as, Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) are not retroactively applicable on collateral review See e.g., Varela v. United States, 400 F 3d 864, 867-68 (11th Cir 2005), cert. den'd, 529 U.S. 1122, 120 S.Ct. 1992, 146 L.Ed.2d 817 (2005) The Eleventh Circuit has found that the decision in Alleyne is based on Apprendi, therefore, a defendant whose conviction became final long before Apprendi and Alleyne were decided, cannot now collaterally challenge his conviction based on his jury's failure to find drug quantity, because the holding in Apprendi does not apply retroactively Starks v. Warden, FCC Coleman-USP I, 552 Fed.Appx. 869 (11th Cir 2013)(unpublished) Other courts have similarly held that since Apprendi and its progeny have not been found retroactively applicable, thereby implying that the Supreme Court will not declare Alleyne to be retroactively applicable. See Simpson v. United States, 721 F.3d 875 (7th Cir

fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt " Apprendi, 520 U S at 490 Movant alleges that his guideline range was determined and drove his ultimate sentence upward based on facts which were neither charged in the indictment nor proved beyond a reasonable doubt by the jury at trial Therefore, his sentence enhancement violated Alleyne and Descamps

The Eleventh Circuit has determined that Alleyne, an extension of Apprendi, is not retroactively applicable to cases on collateral review See Jeanty, Jr. v. Warden, FCI-Miami, ___ F 3d ___, 2014 WL 3411144 (11th Cir July 15, 2014)(published)(citing United States v. Harris, 741 F 3d 1245, 1250 n.3 (11th Cir 2014)); see also, Starks v. FCC Coleman USP I, ___ F 3d. ___, 2013 WL 6670797 (11th Cir 2113)(unpublished); see also, Chester v. Warden, ___ Fed.Appx. ___, 2014 WL 104150 (11TH Cir 2014)(unpublished)(citing, Dohrmann v. United States, 442 F 3d 1279, 1281-82 (11th Cir 2006); McCoy v. United States, 266 F 3d 1245, 1256-58 (11th Cir 2001)(holding that Apprendi is not retroactively applicable to cases on collateral review))

Further, other courts who have considered the issue have also held that Alleyne has not been made retroactively applicable to cases on collateral review See In re Payne, No 13-5103, 2013 WL 5200425, at *1-*2 (10th Cir Sept 17, 2013) (agreeing with the Seventh Circuit that Alleyne is an extension of Apprendi and does

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2013); Scott v. United States, 2013 WL 4077546, *1 (S.D.Ga. 2013); Ward v. United States, 2013 WL 4079267, *2 (W.D.N.C. 2013) Unless the Supreme Court decides some time in the future that Alleyne applies retroactively on collateral review, movant cannot now collaterally challenge his convictions and sentences pursuant to Alleyne.

not apply retroactively); Simpson v. United States, 721 F 3d 875, 876 (7th Cir 2013) (holding that Alleyne, like Apprendi, was not made retroactive); Frank v. United States, Nos. CV 113-113, CR 103-045, 2013 WL 4679826, at *3 n. 1 (S D.Ga. Aug 30, 2013) ("The Court is not aware of any authority indicating that Alleyne is retroactively applicable, and the case itself provides no such indication "); Ward v. United States, No 1:02-cr-00063-MR-1, 2013 WL 4079267, at *2 (W.D.N C Aug 13, 2013) (finding that petitioner's motion was untimely and §2255(f)(3) did not apply because the Supreme Court has not found that Alleyne is retroactive to cases on collateral review); Luney v. Quintana, No 6:13-003-DCR, 2013 WL 3779172, at *3 (E D.Ky July 18, 2013) (noting that "there is no indication in Alleyne, that the Supreme Court made [that] holding retroactive to cases on collateral review ")

Like Alleyne, Descamps, an extension of Apprendi is also not retroactively applicable to cases on collateral review The Supreme Court has also not declared Descamps to be retroactive to cases on collateral review Wilson v. Warden, FCC Coleman, 2014 WL 4345685, *3 (11th Cir Sept 3, 2014); Groves v. United States, 755 F 3d 588, 593 (7th Cir 2014); Baker v. Chapa, 2014 WL 4100712, *1 (5th Cir Aug 21, 2014) Nor has the Sixth Circuit so found. Shelton v. United States, 2014 WL 460868, *3 (E.D.Tenn. Feb.5, 2014) Moreover, Descamps was decided in the context of a direct appeal, and the Supreme Court has not since applied it to a case on collateral review Cf In re Anderson, 396 F 3d 1336, 1339 (11th Cir 2005) (holding that United States v. Booker, 543 U S 220 (2005), was not retroactively applicable, in part, because the Supreme Court had decided it on direct appeal, and had not applied it to a case on collateral review)

Nevertheless, it bears noting that even if counsel was deficient for failing to request a downward departure at sentencing for the reasons set forth by the movant in this collateral proceeding, no showing has been made that the court would have granted a further variance, and imposed a lesser sentence Movant has not met his burden of demonstrating that such an argument would have succeeded, much less that his sentence was unreasonable in light of the record before this court.

To the extent movant also argues that the court erred by enhancing his sentence as an ACCA based on facts not charged in the Indictment, found by a jury, nor admitted by him, that claim warrants no relief In fact, the Eleventh Circuit has previously determined that "district courts may determine both the existence of prior convictions and the factual nature of those convictions, including whether they were committed on different occasions, so long as they limit themselves to Shepard-approved documents " United States v. Weeks, 711 F 3d 1255, 1259 (11th Cir 2013) Here, the court properly found movant qualified for an enhanced sentence as an armed career criminal The enhanced penalty provision need not have been charged in the indictment nor proven beyond a reasonable doubt United States v. Weeks, supra. Thus, no deficient performance or prejudice under Strickland has been established arising from counsel's failure to pursue this issue

Moreover, both the Supreme Court and the Eleventh Circuit have held that "[A] sentence must be both procedurally and substantively reasonable See Gall v. United States, 552 U S 38, 51 (2007) ("Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence. "); United States v.

Ellisor, 522 F 3d 1255, 1273 (11th Cir 2008) A sentence will only be reversed as substantively unreasonable upon a "definite and firm conviction that the district court committed a clear error of judgment in weighing the §3553(a) factors " United States v. McGarity, 669 F 3d 1218, 1264 (11th Cir)(internal quotation marks omitted), cert. den'd, McGarity v. United States, ___ U S ___, 133 S.Ct 378, 184 L.Ed.2d 220 (2012). The party challenging the sentence bears the burden of proof Id.

The record confirms that the court not only considered defense counsel's arguments against the enhanced sentence, but also considered the advisory guidelines, along with the §3553 statutory factors The movant was sentenced to the statutory minimum mandatory term of 15 years in prison. It is evident from the record that the district court properly applied 18 U S C §3553 to the facts of this case and imposed a substantively reasonable sentence. Moreover, the fact that movant's sentence is far below the maximum term of life imprisonment, is also a strong indication of substantive reasonableness See United States v. Gonzalez, 550 F 3d 1319, 1324 (11th Cir 2008)(holding that a sentence was substantively reasonable, in part because it was "well below the maximum ten-year sentence") Movant has not demonstrated that counsel was deficient, much less that he was prejudiced under Strickland based on counsel's failure to pursue this nonmeritorious issue Strickland v. Washington, supra

In conclusion, the record reveals that movant is not entitled to relief on any of the claims presented in this motion to vacate proceeding as it is apparent from the extensive review of the record that the claims warrant no relief, and more particularly, that movant's guilty plea was entered freely, voluntarily and

knowingly with the advice received from competent counsel and not involuntarily and/or unknowingly entered, as now claimed by him. See Boykin v. Alabama, 395 U.S 238, 243 (1969); Brady v. United States, 397 U S 742, 748 (1970) [13] See also Hill v. Lockhart, supra; Strickland v. Washington, supra. 466 U S. 668 (1984)

VI Evidentiary Hearing

To the extent movant requests an evidentiary hearing on his claim, it should be denied. The movant has the burden of establishing the need for an evidentiary hearing, and he would only be entitled to a hearing if his allegations, if proved, would establish his right to collateral relief See Higgs v. United States, 711 F Supp.2d 479, 552 (D.Md. 2010)(citing Townsend v. Sain, 372 U S 293, 312, 83 S.Ct 745, 9 L Ed.2d 770 (1963), overruled on other grounds by 504 U S 1, 112 S Ct 1715, 118 L Ed.2d 318 (1992)) Further, a hearing is not required on patently frivolous claims or those which are based upon unsupported generalizations or affirmatively contradicted by the record. See Holmes v. United States, 876 F 2d 1545, 1553 (11th Cir 1989), citing, Guerra v. United States, 588 F 2d 519, 520-21 (5th Cir 1979) As discussed in this Report, the arguments raised are unsupported by the record or without merit No evidentiary hearing is required.

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[13]It is well settled that before a trial judge can accept a guilty plea, the defendant must be advised of the various constitutional rights that he is waiving by entering such a plea. Boykin v. Alabama, 395 U S. 238, 243 (1969) Since a guilty plea is a waiver of substantial constitutional rights, it must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences surrounding the plea. Brady v. United States, 397 U.S. 742, 748 (1970) A voluntary and intelligent plea of guilty made by an accused person who has been advised by competent counsel may not be collaterally attacked. Mabry v. Johnson, 467 U.S. 504, 508 (1984)

VII Certificate of Appealability

As amended effective December 1, 2009, §2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U S C §2253(c)(2) " See Rule 11(a), Rules Governing Section 2255 Proceedings for the United States District Courts A §2255 movant "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U S C §2253(c) " See Fed.R.App.P 22(b)(1) Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability See 28 U S C §2255 Rule 11(b)

However, "[A] certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right." See 28 U.S.C §2253(c)(2) To make a substantial showing of the denial of a constitutional right, a §2255 movant must demonstrate "that reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further " Miller-El v. Cockrell, 537 U S 322, 336-37 (2003) (citations and quotation marks omitted); see also Slack v. McDaniel, 529 U S 473, 484 (2000); Eagle v. Linahan, 279 F 3d 926, 935 (11th Cir 2001)

After review of the record in this case, the Court finds the movant has not demonstrated that he has been denied a

constitutional right or that the issue is reasonably debatable See Slack, 529 U S at 485; Edwards v. United States, 114 F 3d 1083, 1084 (11th Cir 1997) Consequently, issuance of a certificate of appealability is not warranted and should be denied in this case Notwithstanding, if movant does not agree, he may bring this argument to the attention of the district judge in objections

VIII Conclusion

It is therefore recommended that this motion to vacate be denied on the merits, that any pending motions not otherwise ruled upon be denied as moot, that a certificate of appealability be denied; and, the case closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

Signed this 29th day of September, 2014

UNITED STATES MAGISTRATE JUDGE

cc: Gregory Welch, Pro Se
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APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT P. TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Douglas J. Mincher
Clerk of Court

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June 09, 2015

Steven M. Larimore
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 14-15733-C
Case Style: Gregory Welch v. USA
District Court Docket No: 0:13-cv-62770-KAM
Secondary Case Number: 0:09-cr-60212-KAM-1

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DOUGLAS J. MINCHER, Clerk of Court

Reply to: Walter Pollard, C
Phone #: (404) 335-6186

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-15733-C

GREGORY WELCH,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Gregory Welch moves for a certificate of appealability in order to appeal the denial of his motion to vacate, filed pursuant to 28 U.S.C. § 2255. His motion is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Welch's motion for appointment of counsel is DENIED AS MOOT.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

APPENDIX "C"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-CR-60212-KAM

UNITED STATES OF AMERICA

vs.

GREGORY WELCH,

Defendant.
_____/

PLEA AGREEMENT

The United States of America and Gregory Welch (hereinafter referred to as the "Defendant") enter into the following agreement:

1. The Charges to which the Defendant Is Pleading Guilty: The Defendant agrees to plead guilty to the sole Count of the Indictment. That Count charges that, on or about March 19, 2009, in Broward County, in the Southern District of Florida, the Defendant, having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition in and affecting interstate and foreign commerce, that is: (a) one (1) Lorcin, Model L380, .380-caliber semi-automatic pistol, serial number 532504; (b) five (5) rounds of Winchester .380-caliber ammunition; and (c) one (1) round of Remington .380-caliber ammunition; any one of which being a violation; in violation of Title 18, United States Code, Section 922(g)(1).

2. The Elements of the Offenses of Conviction: The elements of the offense of possession of a firearm and ammunition by a convicted felon, in violation of Title 18, United

States Code, Section 922(g)(1), as charged in the sole Count of the Indictment, are as follows:

First, that the Defendant knowingly possessed a firearm in or affecting interstate commerce, as charged; and

Second. that before the Defendant possessed the firearm, the Defendant had been convicted in a court of a crime punishable by imprisonment for a term in excess of one year, that is, a felony offense.

3. Statutory Penalties: The Defendant also understands and acknowledges that, as to the sole Count of the Indictment, the Court may impose a maximum sentence of ten (10) years' imprisonment, to be followed by up to three (3) years' supervised release, and may impose a fine of $250,000. The Defendant understands and acknowledges that a violation of the terms of his supervised release can result in additional criminal penalties.

4. Special Assessment: The Defendant further understands and acknowledges that, in addition to the sentence imposed under paragraph 3 of this Agreement, a special assessment in the amount of $100 will be imposed. The Defendant agrees that any special assessment imposed shall be paid at the time of sentencing.

5. Applicability of Sentencing Guidelines: The Defendant is aware that the sentence will be imposed by the Court after considering the Federal Sentencing Guidelines and Policy Statements (hereinafter "Sentencing Guidelines"). The Defendant acknowledges and understands that the Court will compute an advisory sentence under the Sentencing Guidelines and that the applicable guidelines will be determined by the Court relying in part

on the results of a Pre-Sentence Investigation by the Court's Probation Office, which investigation will commence after the entry of the Defendant's guilty plea. The Defendant is also aware that, under certain circumstances, the Court may depart from the advisory sentencing guideline range that it has computed, and may raise or lower that advisory sentence under the Sentencing Guidelines. The Defendant further understands that the Court is required to consider the advisory guideline range determined under the sentencing guidelines, but is not bound to impose that sentence; the Court is permitted to tailor the ultimate sentence in light of other statutory concerns, and such sentence may be either more severe or less severe than the Sentencing Guidelines' advisory sentence. Knowing these facts, the Defendant understands and acknowledges that the Court has the authority to impose any sentence within and up to the statutory maximum authorized by law for the offense identified in paragraph 1 and that the Defendant cannot withdraw his guilty plea solely as a result of the sentence imposed.

6. Rights Waived by Pleading Guilty: The Defendant understands that by pleading guilty, he knowingly and voluntarily waives the following rights:

a. the right to plead not guilty and to persist in a plea of not guilty;

b. the right to a speedy and public trial before a jury of his peers;

c. the right to the effective assistance of counsel at trial, including, if the Defendant could not afford an attorney, the right to have the Court appoint an attorney for the Defendant;

d. the right at trial to be presumed innocent until guilt has been proven

beyond a reasonable doubt by the United States;

e. the right at trial to confront and cross-examine witnesses against the Defendant;

f. the right to compel or subpoena the testimony of witnesses and other evidence to present at trial;

g. the right at trial to testify or to remain silent, and the right that such silence could not be used against the Defendant;

h. the right to challenge the sufficiency of the indictment; and

I. the right to appeal any pretrial rulings or a finding of guilt.

7 Government's Right to Disclose Information to the Court: The Office of the United States Attorney for the Southern District of Florida (hereinafter "Office") reserves the right to inform the Court and the Probation Office of all facts pertinent to the sentencing process, including all relevant information concerning the offenses committed, whether charged or not, as well as concerning the Defendant and the Defendant's background. Subject only to the express terms of any agreed-upon sentencing recommendations contained in this Agreement, this Office further reserves the right to make any recommendation as to the quality and quantity of punishment.

8. Acceptance of Responsibility: The United States and the Defendant agree that, although not binding on the Probation Office or the Court, they will jointly recommend that the Court should reduce by two levels the sentencing guideline level applicable to the Defendant's offense, pursuant to Section 3E1.1 of the Sentencing Guidelines, based upon the

Defendant's recognition and affirmative and timely acceptance of personal responsibility. If at the time of sentencing the Defendant's offense level is determined to be 16 or greater, and the Defendant complies with the requirements of Section 3E1.1, the United States will make a motion requesting an additional one-level decrease pursuant to Section 3E1.1(b) of the Sentencing Guidelines, stating that the Defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the Court to allocate their resources efficiently.

9. Limitation on Joint Sentencing Recommendations: The Defendant understands and agrees that the United States will not be required to make the motion and sentencing recommendation set forth in paragraph 8 if the Defendant: (a) fails or refuses to make a full, accurate and complete disclosure to the Probation Office of the circumstances surrounding the relevant offense conduct; (b) is found to have misrepresented facts to the government prior to entering this plea agreement; or (c) commits any misconduct after entering into this plea agreement, including but not limited to committing a state or federal offense, violating any term of release, or making false statements or misrepresentations to any governmental entity or official.

10. Factual Proffer: The Defendant, his counsel, and the United States further agree that, had this case proceeded to trial, the United States would have introduced the following evidence, which is sufficient to support a guilty plea and proves beyond a reasonable doubt that the Defendant is guilty of the crime charged in the sole Count of the

Indictment:

On March 17, 2009, law enforcement officers searched Defendant's apartment. A Lorcin, Model L380, .380-caliber semi-automatic pistol, serial number 532504, was found in the attic space in the apartment. The firearm was loaded with six (6) rounds of ammunition, five (5) of which were Winchester .380-caliber ammunition, and one (1) of which was Remington .380-caliber ammunition. After the items were found, Defendant gave a recorded statement admitting to possession of the firearm and ammunition. The firearm and all six (6) rounds of ammunition have traveled in interstate or foreign commerce. The Defendant is a previously convicted felon.

11. No Promises or Representations Regarding Ultimate Sentence: The Defendant is aware that the sentence has not yet been determined by the Court. The Defendant also is aware that any estimate of the probable sentencing range or sentence that the Defendant may receive, whether that estimate comes from the Defendant's attorney, the government, or the probation office, is a prediction, not a promise, and is not binding on the government, the probation office, or the Court. The Defendant understands further that any recommendation that the government makes to the Court as to sentencing, whether pursuant to this agreement or otherwise, is not binding on the Court and the Court may disregard the recommendation in its entirety. The Defendant acknowledges that no one has promised or guaranteed what sentence the Court will impose. The Defendant understands and acknowledges, as previously acknowledged in paragraph 5 above, that the Defendant may not withdraw his plea based upon (a) the Court's decision not to accept a sentencing recommendation made

by the Defendant and/or the government, or (b) the fact that he received an incorrect estimate of the sentence that he would receive, whether that estimate came from his attorney, the United States, and/or the Probation Office.

12. Voluntariness of Plea: The Defendant agrees that he has entered into this Plea Agreement freely and voluntarily, and that no threats or promises, other than the promises contained in this written Plea Agreement, were made to induce the Defendant to enter his plea of guilty.

13. Forfeiture and Consent to Disposal/Destruction of Firearm and Ammunition: The Defendant agrees to forfeit all interests in any firearm or ammunition that is the subject of the Indictment, which the Defendant currently owns or has previously owned, or over which the Defendant currently, or has in the past, exercised control, directly or indirectly. This includes, but is not limited to,

(a) one (1) Lorcin, Model L380, .380-caliber semi-automatic pistol, serial number 532504;

(b) five (5) rounds of Winchester .380-caliber ammunition; and

(c) one (1) round of Remington .380-caliber ammunition.

Defendant further agrees to hold the United States, its agents, and employees harmless from any claims whatsoever in connection with the seizure or destruction of property covered by this agreement. The Defendant agrees that this property may be destroyed or disposed of in accordance with the policies and procedures of the custodial agency. The Defendant further agrees to waive all constitutional and statutory challenges in any manner (including direct

appeal, habeas corpus, or any other means) to any destruction or disposal of property carried out in accordance with this Plea Agreement on any grounds, including that the forfeiture constitutes an excessive fine or punishment. Defendant acknowledges that all property covered by this agreement is subject to forfeiture as property involved in illegal conduct related to the sole Count of the Indictment.

14. Appellate Waiver: The Defendant is aware that Title 18, United States Code, Section 3742 affords the Defendant the right to appeal the sentence imposed in this case. Acknowledging this, in exchange for the undertakings made by the United States in this plea agreement, the Defendant hereby waives all rights conferred by Section 3742 to appeal any sentence imposed, including any restitution order, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure and/or a variance from the guideline range that the court establishes at sentencing. The Defendant further understands that nothing in this agreement shall affect the government's right and/or duty to appeal as set forth in Title 18, United States Code, Section 3742(b). However, if the United States appeals the Defendant's sentence pursuant to Section 3742(b), the Defendant shall be released from the above waiver of appellate rights. By signing this agreement, the Defendant acknowledges that he has discussed the appeal waiver set forth in this agreement with his attorney. The Defendant further agrees, together with the United States, to request that the district court enter a specific finding that the Defendant's waiver of his right to appeal the sentence to be imposed in this case was knowing and voluntary.

15. Appellate Waiver Carve-Out. Notwithstanding the above waiver of appeal, pursuant to Federal Rule of Criminal Procedure 11(a)(2), the United States consents to the Defendant's entry of a conditional plea of guilty and a reservation of the right to have an appellate court review the district court's denial of his motion to suppress the physical evidence, specifically, the Lorcin, Model L380, .380-caliber semi-automatic pistol, serial number 532504; the five (5) rounds of Winchester .380-caliber ammunition; and the one (1) round of Remington .380-caliber ammunition. The United States and the Defendant agree that the suppression issue pertaining to the physical evidence is case dispositive.

16. Entire Agreement: This is the entire agreement and understanding between the United States and the Defendant. There are no other agreements, promises, representations, or understandings. This Agreement binds only the United States Attorney's Office for the Southern District of Florida. It does not bind any other United States Attorney's Office, or any other office or agency of the United States, or any state or local prosecutor.

WIFREDO A. FERRER
UNITED STATES ATTORNEY

Date: 6/18/10 By: _____
JASON LINDER
ASSISTANT UNITED STATES ATTORNEY

Date: 6/18/10 By: _____
GREGORY WELCH, DEFENDANT

Date: 6/18/10 By: _____
PETER BIRCH
ATTORNEY FOR DEFENDANT

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUNE 13, 2012
JOHN LEY
CLERK

No. 10-14649

D.C. Docket No. 0:09-cr-60212-KAM-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

GREGORY WELCH,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(June 13, 2012)

Before DUBINA, Chief Judge, FAY, and KLEINFELD,* Circuit Judges.

* The Honorable Andrew J. Kleinfeld, Senior United States Circuit Judge for the Ninth Circuit, sitting by designation.

KLEINFELD, Senior Circuit Judge:

We address whether consent to a search was voluntary and whether it was "fruit of the poisonous tree." We also address whether a Florida conviction for robbery is a "violent felony" under the Armed Career Criminal Act.

Facts

Broward County sheriff's deputies had probable cause to believe that a John Jacobs had robbed a convenience store. Two people had been shot during the robbery. The deputy sheriffs learned that Jacobs lived with his mother in an apartment complex behind the store, and "frequented" two other apartments there, Gregory Welch's being one of them. Two days after the robbery, thirteen officers went to the three apartments looking for Jacobs. They had not obtained search or arrest warrants. The plan was to have groups of three officers knock simultaneously on the doors and ask whomever was there whether they had seen Jacobs. The police knew what Jacobs looked like, because one of the robbery victims had identified him from a photograph.

Someone other than Jacobs answered the door at Welch's apartment. The

three officers at the door asked him if anyone else was there, and he said there was, but would not say who. The police entered and did a "limited protected sweep" to see if anyone inside posed a threat to them. Welch was in a bedroom on the bed talking on a cell phone, smoking a "joint," and minding a baby. The police had drawn their guns before entering the apartment, but holstered them when they saw Welch on the bed.

The police took Welch out onto the balcony. They heard on the police radio that Jacobs had been arrested, so now they were looking only for his gun. They asked Welch if they could search his apartment. He refused. When the police told him they would then have to get a search warrant, which "would take a while," he consented orally and signed a written consent form. It was "four or five minutes, if that" from when the police entered the apartment to when they asked for consent, and another "several" minutes between oral and written consent. The police then searched the apartment, and found Welch's pistol (which was not the gun Jacobs had used in the robbery) and ammunition in "an attic space." After the police found the pistol and cartridges, they put Welch in their van, in the passenger seat and without handcuffs, and he admitted that the pistol and ammunition were his.

Though Welch testified otherwise, the district court found that: (1) the police did not search the apartment until Welch gave his written consent; (2) the police did not threaten to ransack the apartment if he refused consent; (3) the police did not threaten to have the Department of Children and Families take Welch's children away if he refused consent; and (4) the consent form was read and explained to Welch. The district court found that Welch was not intimidated into consenting by the police, as was shown by his initial refusal as well as the plain advice of rights in the form. Rather, the court found, Welch consented because he was not going to be allowed back into the apartment to somehow dispose of the handgun and ammunition, so it made sense for him to agree to the search and hope the police would not find his hiding place.

The district court denied Welch's motion to suppress the pistol and his statements in the police car. The court held that the initial "protective sweep" was unlawful, because the police were not lawfully in the apartment. They entered to do the sweep, instead of doing the sweep because they had lawfully entered and needed to protect themselves after doing so. The question, as the court saw it, was whether the consent to search was voluntary, and whether the discovery of the pistol and Welch's admission were "tainted" by the unlawful entry that led to

them. The court held that the consent was voluntary, and that the consent and admission were not tainted.

Welch pleaded guilty to being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1), reserving the right to appeal the denial of his motion to suppress. The presentence report categorized Welch as an armed career criminal because of three prior violent felony convictions, and concluded that the Armed Career Criminal Act required that he be sentenced to a minimum of fifteen years in prison because of these prior convictions.[1] That sentence was imposed, subject to Welch's reservation of the right to challenge it. Only one of the predicate offenses is challenged in this appeal, a 1996 conviction for Florida strong arm robbery.

Analysis

A. The Motion to Suppress

Welch argues that the pistol and ammunition should be suppressed because they were found in an unlawful search, and that his subsequent statements made while he was sitting in the passenger seat of the police car should be suppressed

[1] 18 U.S.C. § 924(e).

because the putatively unlawful sweep brought them about. The government argues that the initial entry into the apartment was not unlawful, though the district court concluded that it was. We need not decide this question. Even if the sweep was unlawful, the government could avoid suppression if it showed that Welch's consent to the search was voluntary, and that it was not tainted by the unlawful sweep.[2] We, like the district court, so conclude.

Denial of a motion to suppress is a mixed question of law and fact.[3] The district court's findings of fact control unless they are clearly erroneous, but its interpretation and application of law are reviewed de novo.[4]

The first question we address is whether Welch's consent and admissions were "fruit of the poisonous tree," the "poisonous tree" being the putatively unlawful sweep. It is undisputed that the officers who entered Welch's room did so with their guns drawn, but holstered them when they saw that Welch was unarmed. And it is undisputed that Welch consented to the search, first orally and

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[2] United States v. Delancy, 502 F.3d 1297, 1308 (11th Cir. 2007).

[3] Id. at 1304.

[4] Id.

then in writing, within a few minutes of being escorted onto his balcony. Most importantly, it is undisputed that Welch initially refused to consent.

Two precedents control our analysis, United States v. Santa[5] and United States v. Delancy.[6] In both cases, we considered three factors that gave us a "useful structure" to determine whether a defendant's consent was tainted by illegal police actions: the time elapsed between the illegal act and the search, any intervening circumstances, and the purpose and flagrancy of the unlawful government conduct.[7] In Santa, the consent, even if voluntary, "did not purge the primary taint of the illegal entry and arrest."[8] The suspect was still on the floor, handcuffed, three minutes after the DEA had broken down his door and burst into his apartment, when he told them where they could find the drugs. The search and discovery of the evidence were all over by the time he signed the consent form.[9] Santa is of no help to Welch, because Welch was standing on the balcony, not handcuffed, when he consented, and he initially refused to consent. No search

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[5] United States v. Santa, 236 F.3d 662 (11th Cir. 2000).

[6] United States v. Delancy, 502 F.3d 1297 (11th Cir. 2007).

[7] Id. at 1309–10.

[8] Santa, 236 F.3d at 677.

[9] Id. at 677–78.

occurred until he changed his mind. It is one thing to consent to a police request while flat on one's face on the floor and handcuffed, quite another when chatting without any physically forcible coercion after having left the scene of the police intrusion.

This distinction bears on the difference between Santa and Delancy. Delancy assumes, as we do, that the protective sweep was unlawful, but, as in this case, the district court found that the sweep was for the protection of the officers, not a subterfuge to intimidate and question the appellant.[10] Had the entry "been made for the purpose of gaining consent," then the consent would be tainted, because attenuation analysis is unnecessary "when the police act with the express purpose of exploiting an illegal action."[11] That is the central principle of a search that is unconstitutional as "fruit of the poisonous tree" despite voluntary consent.[12] And once inside, albeit unlawfully, the officers neither in Delancy nor here acted "flagrantly" by "tear[ing] the house apart."[13] There and here, "timing is not the

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[10] Delancy, 502 F.3d at 1312.

[11] Id.

[12] See Wong Sun v. United States, 371 U.S. 471, 488, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441 (1963).

[13] Delancy, 502 F.3d at 1313.

most important factor."[14] We decide whether consent was tainted by illegality with "a pragmatic evaluation of the extent to which the illegal police conduct caused the defendant's response," not with a stopwatch.[15]

"When [police] enter unlawfully but mistakenly and in good faith, and when they obtain the knowing, intelligent, and voluntary consent of a third party without exploiting their unlawful entry in any way, the purposes of the exclusionary rule would not be served by excluding valuable evidence."[16] In this case, as in Delancy, there was no such exploitation and is no "taint" such as to make the evidence "fruit of the poisonous tree," if the consent was voluntary.[17] And it was.

We review voluntariness as a factual question that is determined under the totality of the circumstances.[18] Relevant factors include "voluntariness of the defendant's custodial status, the presence of coercive police procedure, the extent

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[14] Id. at 1311.

[15] Id. at 1310 (internal quotation marks and citations omitted).

[16] Id. at 1314.

[17] Cf. Oregon v. Elstad, 470 U.S. 298, 306, 105 S. Ct. 1285, 1291, 84 L. Ed. 2d 222 (1985).

[18] United States v. Blake, 888 F.2d 795, 798 (11th Cir. 1989).

and level of the defendant's cooperation with police, the defendant's awareness of his right to refuse to consent to the search, the defendant's education and intelligence, and, significantly, the defendant's belief that no incriminating evidence will be found."[19]

Welch argues he was coerced into giving consent. The officers asked for consent a few minutes after entering his bedroom with their guns drawn. But Welch must not have felt coerced into consenting when they first asked, because he declined to consent. They took him out on the balcony, asked if they could search, and he told them they could not. A person who actually says "no" has not been coerced into saying "yes."

Thus at least up to the time Welch refused to consent, he cannot be said to have been coerced into consenting involuntarily. That leaves, for analysis of coercion and voluntariness, what happened after he said "no." The police officer standing on the balcony with him said, "Fine, but we're going to have to get a search warrant." That is not coercion vitiating voluntariness. And it did not. Welch still did not consent. What changed his mind was the officer's next remark,

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[19] Id.

that "it would take a while."

The explicit threat here is that Welch might have to stand around with nothing to do for some substantial period of time, much as we all do whenever we are stuck in a line. It would be a delicate will indeed that might be overborne by the threat of a period of idleness and wasted time. Yet that threat, "it would take a while," is what changed Welch's "no" to a "yes."[20]

The district judge provided a persuasive explanation of why Welch changed his mind. Welch, the court found, "reasonably believed that the officers would eventually be able to obtain a search warrant" and that, because he would have to wait on the balcony while they did, he would not be able to go into the apartment, retrieve the pistol and ammunition, and somehow dispose of them before the police came back with a warrant. So "it made sense for [Welch] to agree to the search rather than wait for the warrant to be obtained and, because of where the

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[20] Although Welch testified that the officers threatened to send his children to Child Services if he did not consent, the judge found that he was not telling the truth, and that this did not occur. That threat could not overbear his will, if, as the court reasonably found, it was not made. We do not mean to imply that a warning that social workers will come to care for children if their adult caregivers become unavailable on account of detention is necessarily an improperly coercive threat, as opposed to helpful information assuring that children will not be abandoned to the street.

items were hidden, hope for the best." That was a rational gamble, but one that Welch lost. Welch's consent was not coerced, just constrained, by having to place his bet on one of two poor alternatives. Maybe if he let them in, the police would want to get the search done quickly and fail to find his contraband. Or maybe if he put them to the trouble of getting a search warrant, they would search more thoroughly because he had inconvenienced them.

The district court's findings were supported by the evidence and its conclusion that Welch gave legally efficacious consent to the search was correct.

B. Whether Florida Robbery Is a "Violent Felony"

The ordinary maximum sentence for being "a felon in possession of a firearm" is ten years imprisonment.[21] But if a felon in possession has three previous convictions for violent felonies or serious drug offenses, then the Armed Career Criminal Act requires a minimum sentence of fifteen years imprisonment.[22] Welch had three previous potentially qualifying convictions when he was sentenced to this statutory minimum. He argues on appeal that his 1996 Florida

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[21] 18 U.S.C. §§ 922(g)(1), 924(a)(2).

[22] 18 U.S.C. § 924(e).

conviction for strong arm robbery does not qualify as a "violent felony." If that conviction were not counted as a predicate offense, he would not be subject to the statutory minimum.

The parties argue the case primarily under the categorical approach, not the modified categorical approach.[23] The record cognizable for purposes of the statutory enhancement is sparse. The presentence report says that according to the victim, Welch punched him in the mouth, fought with him, and grabbed his gold bracelet from his wrist, while another robber took the gold chain from the victim's neck. But the presentence report does not state the source of this information, and the record merely includes an information alleging that Welch unlawfully took jewelry from the victim's person "by the use of force, violence, assault, or putting in fear," and a judgment showing that Welch pleaded guilty to this information, and was convicted of "strong arm robbery" in violation of Florida Statute Section 812.13(1). We decide this issue under the categorical approach.

The federal Armed Career Criminal Act defines "violent felony" as felonies

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[23] "Under [the categorical] approach, we look only to the fact of conviction and the statutory definition of the prior offense, and do not generally consider the particular facts disclosed by the record of conviction." James v. United States, 550 U.S. 192, 202, 127 S. Ct. 1586, 1594, 167 L. Ed. 2d 532 (2007) (internal quotation marks and citations omitted).

that have as an element the "use, attempted use, or threatened use of physical force," or that are "burglary, arson, or extortion, involve[] use of explosives, or otherwise involve[] conduct that presents a serious potential risk of physical injury to another."[24] Welch's Florida robbery conviction was pursuant to a statute that criminalized stealing property from another's person or custody using "force, violence, assault, or putting in fear."[25]

Welch's argument is that the degree of "force" required to violate the state statute at the time of his conviction was too slight to satisfy the federal statute. His point is that Florida law at the time made mere snatching a robbery, and that mere snatching is not forceful enough to satisfy the federal statute under either the "elements clause" or the "residual clause" ("serious potential risk of physical injury to another") of the federal statute. We review de novo whether a prior

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[24] "[T]he term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]" 18 U.S.C. § 924(e)(2)(B).

[25] "'Robbery' means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1).

crime qualifies as a violent felony under the statute.[26] In "determining whether a defendant was convicted of a 'violent felony,' we [turn] to the version of state law that the defendant was actually convicted of violating."[27]

In 1996, when Welch pleaded guilty to robbery, Florida law clearly established that a taking by stealth, as in pickpocketing where the victim is not aware of the theft, was merely larceny, not robbery.[28] But the state courts of appeal were divided on whether a snatching, as of a purse, or cash from a person's hand, or jewelry on the person's body, amounted to robbery.[29] Subsequently, a new Florida statute established the crime of "robbery by sudden snatching," in

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[26] United States v. McGill, 618 F.3d 1273, 1274–75 (11th Cir. 2010).

[27] McNeill v. United States, ___ U.S. ___, 131 S.Ct. 2218, 2222, 180 L. Ed. 2d 35 (2011).

[28] See McCloud v. State, 335 So. 2d 257, 258–59 (Fla. 1976).

[29] See, e.g., Goldsmith v. State, 573 So. 2d 445, 445 (Fla. 2d Dist. Ct. App. 1991) (holding that the "slight force used to remove the bill from [the victim's] hand" was "insufficient to constitute the crime of robbery"); A.J. v. State, 561 So. 2d 1198, 1198 (Fla. 3d Dist. Ct. App. 1990) (holding that "the degree of force used to [grab a camera hanging from the victim's shoulder] was insufficient to constitute robbery"); Larkins v. State, 476 So. 2d 1383, 1385 (Fla. 1st Dist. Ct. App. 1985) (holding that "sufficient force was exercised to fulfill the requirements of the robbery statute" where the robber grabbed cash out of the victim's hand); Andre v. State, 431 So. 2d 1042, 1043 (Fla. 5th Dist. Ct. App. 1983) (holding that "the act of 'snatching' money from another's hands is force and that force will support a robbery conviction").

between larceny and robbery.[30] This statute appears to have been a legislative response to a 1997 Florida Supreme Court decision holding that "there must be resistance by the victim that is overcome by the physical force of the offender" to establish robbery, so that the intermediate appellate decisions holding mere snatching to be sufficient were put in doubt.[31] Welch pleaded guilty before the Florida Supreme Court decision and the new statute, in a judicial district that had not yet spoken definitively on the question,[32] and at a time when the controlling Florida Supreme Court authority held that "any degree of force" would convert larceny into a robbery.[33] So we assume for purposes of analysis that Welch pleaded guilty to robbery at a time when mere snatching sufficed.[34]

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[30] "'Robbery by sudden snatching' means the taking of money or other property from the victim's person, with intent to permanently or temporarily deprive the victim or the owner of the money or other property, when, in the course of the taking, the victim was or became aware of the taking. In order to satisfy this definition, it is not necessary to show that: (a) The offender used any amount of force beyond that effort necessary to obtain possession of the money or other property; or (b) There was any resistance offered by the victim to the offender or that there was injury to the victim's person." Fla. Stat. § 812.131 (2000).

[31] Robinson v. State, 692 So. 2d 883, 886 (Fla. 1997) (holding that robberies must "be accomplished with more than the force necessary to remove the property from the person").

[32] See Santiago v. State, 497 So. 2d 975, 976 (Fla. 4th Dist. Ct. App. 1986) (holding that where a defendant reached into a car and tore necklaces off of a victim's neck, leaving scratch marks, evidence of force was sufficient to support a robbery because the "facts of this case, unlike picking a pocket or snatching a purse without any force or violence, show sufficient force, be it ever so little, to support robbery") (emphasis added).

[33] McCloud v. State, 335 So. 2d 257, 258–59 (Fla. 1976).

[34] "A federal court applying state law is bound to adhere to decisions of the state's intermediate appellate courts absent some persuasive indication that the state's highest court

United States v. Lockley holds that Florida attempted robbery is a "crime of violence" under the Sentencing Guidelines.[35] Welch argues that we should distinguish Lockley for two reasons. First, Welch points out that Lockley held that Florida attempted robbery is a "crime of violence" under the Sentencing Guidelines,[36] while the issue here is whether Florida robbery is a "violent felony" under the Armed Career Criminal Act.[37] Second, Welch argues that we should distinguish Lockley because Lockley was convicted after Florida promulgated the "sudden snatching" statute, so snatching from the person might furnish the basis for a robbery conviction here but not in Lockley.

We conclude that even though these distinctions may fairly be made, they should make no difference. We have recognized that the definitions of "crime of

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would decide the issue otherwise." Silverberg v. Paine, Webber, Jackson & Curtis, Inc., 710 F.2d 678, 690 (11th Cir. 1983).

[35] United States v. Lockley, 632 F.3d 1238, 1246 (11th Cir. 2011).

[36] "The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a) (2002).

[37] "[T]he term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]" 18 U.S.C. § 924(e)(2)(B).

violence" under the Sentencing Guidelines and "violent felony" under the Armed Career Criminal Act are "virtually identical," and have held that "[c]onsidering whether a crime is a 'violent felony' is similar to considering whether a conviction qualifies as a 'crime of violence[.]'"[38] We see no reason not to apply Lockley to a case addressing whether Florida robbery is a "violent felony" under the Armed Career Criminal Act.

We also see no reason not to apply Lockley to 1996 Florida robbery, even if robbery at that time could be accomplished by mere snatching. Welch's strongest argument comes from a footnote in Lockley distinguishing the new "robbery by sudden snatching" statute. It notes that while sudden snatching involves "pick-pocketing or other similar activity (so long as the victim is in possession of the money or property and realizes he is being victimized)," robbery under the Florida robbery statute "concerns a far more aggressive and potentially violent form of robbery."[39] Though Lockley does not reach the question of whether robbery by sudden snatching would or would not present "a serious risk of physical injury to another" under the residual clause, we conclude that it does.

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[38] U.S. v. Alexander, 609 F.3d 1250, 1253 (11th Cir. 2010) (internal quotation marks and citations omitted).

[39] Lockley, 632 F.3d at 1246 n.7

Welch correctly points out that under Johnson v. United States, "physical force" means not merely what "force" means in physics, but "violent force—that is, force capable of causing physical pain or injury to another person."[40] That Johnson discussion was in the context of the elements clause requirement of "physical force," not the residual clause requirement of "serious risk of potential injury to another." Arguably the elements clause would not apply to mere snatching, but the issue is not cut and dried. We need not decide whether snatching is sufficiently violent under the elements clause, though, because it suffices under the residual clause.

We look at the statute of conviction to see whether, under the residual clause, "the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another."[41] Under United States v. Harrison, we apply a three-step analysis to see: (1) how the crime is ordinarily committed; (2) whether the crime poses a "serious potential risk of physical injury," similar in degree to the listed crimes; and (3) whether the crime is similar in kind to the listed crimes, or, using the language from Begay v. United States,

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[40] Johnson v. United States, ___ U.S. ___, 130 S. Ct. 1265, 1271, 176 L. Ed. 2d 1 (2010).

[41] James, 550 U.S. at 202, 208.

whether the crime is "purposeful, violent, and aggressive."[42] Sykes v. United States partially abrogated Harrison,[43] and we recently revisited Harrison in United States v. Chitwood.[44] Chitwood limits Begay's "purposeful, violent, and aggressive" language to "strict liability, negligence, and recklessness crimes."[45] Offenses that are not "strict liability, negligence, and recklessness crimes," like robbery, fall within the residual clause "if they categorically pose a serious risk of physical injury that is similar to the risk posed by one of the enumerated crimes."[46]

Sudden snatching ordinarily involves substantial risk of physical injury to the victim. The victim's natural reaction is likely to be to try to hold on to his or her money or property, leading in many cases to serious injury. For example, in the Florida Supreme Court case with the "any degree of force" language, the old woman died from the fall she took when the robber grabbed her purse in a parking

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[42] United States v. Harrison, 558 F.3d 1280, 1287 (11th Cir. 2009); Begay v. United States, 553 U.S. 137, 145, 128 S.Ct. 1581, 1586, 170 L. Ed. 2d 490 (2008).

[43] Sykes v. United States, ___ U.S. ___, 131 S. Ct. 2267, 2277, 180 L. Ed. 2d 60 (2011).

[44] United States v. Chitwood, 676 F.3d 971 (11th Cir. 2012).

[45] Id. at 979; United States v. Schneider, ___ F.3d ___, 2012 WL 1868645, at *5 (11th Cir., May 24, 2012).

[46] Id.

lot.[47] In that respect, the crime is much like burglary, where if the victim perceives what is going on, a violent encounter is reasonably likely to ensue.[48]

We conclude that Florida robbery, both before and after Florida promulgated the "robbery by sudden snatching" statute, qualifies as a violent felony under the Armed Career Criminal Act.

AFFIRMED.

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[47] McCloud v. State, 335 So. 2d 257, 258 (Fla. 1976).

[48] "The main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to investigate." James, 550 U.S. at 203, 127 S. Ct. at 1594.

APPENDIX "D"

defendant to place fear in the victim of a robbery other than by threatening physical harm. We cannot think of any other logical way for a defendant to place fear in the victim of a robbery other than by threatening physical harm."

So it seems to me they're saying fear is being -- by definition, is being imposed by a threat of harm. And I think if you read the Pitts opinion, again, which is not binding, in conjunction with the Wilkerson, the portion of Wilkerson that's still, according to the Eleventh Circuit as recently as February, is still good law, that robbery is a crime of violence, and therefore I believe the -- both of the challenged convictions do qualify, and therefore the Defendant is an armed career criminal under the guidelines

MR. LINDER: Your Honor, may I ask, because it will be an appeal, may I ask two points of clarification?

THE COURT: Yes

MR. LINDER: As to the battery statute, are you deciding under the categorical or the modified categorical approach that it's a crime of violence?

THE COURT: Well, I agree with you that it's -- under both. I think it's a crime of violence under both approaches

MR. LINDER: And then as to the robbery statute The reason I'm asking is your reference to Wilkerson-Whitson, those are cases that decided that robbery was a crime of violence under the so-called residual clause, and I believe

it's 924(e)(2)(B)(ii), whereas Pitts decides that it's a crime of violence under the elements clause of 924(e)(2)(B)(i), and I just want to be clear for the record which clause --

THE COURT: I think it meets both tests, but if it doesn't meet the -- the elements test, I think it meets the residual test

MR. LINDER: Thank you, Your Honor I just wanted to be clear for the record. Thank you

THE COURT: So anything else on those issues?

MR. BIRCH: Not on those issues, Your Honor

THE COURT: All right Are there any other issues regarding the presentence report?

MR. BIRCH: No, Your Honor

MR. LINDER: No, Your Honor

THE COURT: All right Then I'll adopt the findings of the presentence report as the -- the modified findings as the findings of the Court

All right Mr Linder, what's your position regarding sentencing?

MR. LINDER: Your Honor, I believe the correct guideline range now is 180 to 210 months' imprisonment; is that correct?

PROBATION OFFICER: Yes, correct

MR. LINDER: The Government would recommend a sentence at the low end of that range, the 180 months, Your

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

GREGORY WELCH — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

PROOF OF SERVICE

I, Gregory Welch, do swear or declare that on this date, August 26, 2015, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

SOLICITOR GENERAL OF US, Department of Justice, 950 Pennsylvania Avenue N.W., Room 5614, Washington, D.C. 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 26, 2015

(Signature)

ORIGINAL

No 15-6418

Supreme Court, U.S.
FILED
DEC - 3 2015
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY WELCH, PETITIONER

v

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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No. 15-6418

GREGORY WELCH, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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MEMORANDUM FOR THE UNITED STATES

The court of appeals denied petitioner a certificate of appealability under 28 U.S.C. 2253(c) on his claim that he was not properly sentenced under the Armed Career Criminal Act of 1984 (ACCA), 18 U S C. 924(e)(2) Pet App 1 In his petition for a writ of certiorari, petitioner contends (Pet 5-8) that his ACCA sentence was invalid under this Court's decision in Johnson v United States, 135 S Ct 2551 (2015) In Johnson, the Court held that the ACCA's residual clause, 18 U S C 924(e)(2)(B)(ii), is void for vagueness, and, therefore, imposing an increased sentence under the residual clause "violates the Constitution's guarantee of due process " 135 S Ct at 2563 As petitioner notes (Pet

6), the court of appeals relied on the residual clause in rejecting petitioner's challenge to his ACCA sentence on direct appeal See United States v Welch, 683 F 3d 1304, 1310-1314 (11th Cir 2012) (assuming that petitioner's prior robbery conviction occurred when "mere snatching" with "any degree of force" was sufficient to constitute robbery under Florida law and holding that robbery offense qualified as a violent felony under ACCA's residual clause), cert denied, 133 S. Ct 913 (2013)

The court of appeals' unpublished order denying a certificate of appealability, which was issued before this Court's decision in Johnson, does not warrant plenary review Petitioner correctly notes (Pet 8) that there is a circuit conflict concerning whether this Court has "made" Johnson retroactive for purposes of the gatekeeping provision of 28 U.S.C. 2255, which permits a court of appeals to authorize the filing of a successive motion under Section 2255 if the motion relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S C. 2255(h)(2); compare, e.g., Price v United States, 795 F 3d 731, 734-735 (7th Cir 2015) (Johnson announced a new substantive rule that has therefore been "made" retroactive to cases on collateral review), with In re Rivero, 797 F 3d 986, 989-990 (11th Cir 2015) (Johnson announced a new substantive rule of constitutional law, but this Court has not made Johnson retroactive to cases on collateral

review) This case does not implicate that conflict, however, because petitioner seeks review of the denial of his first Section 2255 motion. Accordingly, the appropriate disposition is to grant certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of Johnson.*

DONALD B VERRILLI, JR.
Solicitor General
Counsel of Record

DECEMBER 2015

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* The government waives any further response until so ordered by the Court

No. 15-6418

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GREGORY WELCH, PETITIONER

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the MEMORANDUM FOR THE UNITED STATES, by first-class mail, postage prepaid, this 3rd day of December, 2015.

[See Attached Service List]

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December 3, 2015

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Charlene Goodwin, Supervisor, Case Management Specialist, Office of the Solicitor General, at (202) 514-8844, or email at SupremeCtBriefs@USDOJ.gov. Ms. Goodwin's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

15-6418
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IN THE
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GREGORY WELCH,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

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INTRODUCTION

Johnson is a substantive rule under this Court's test for a simple reason: No matter what procedures the sentencing court employed, it could not impose the punishment that Petitioner received under the residual clause. If no change in a court's procedures could save the court's ultimate judgment, the rule relied upon to attack that judgment cannot be said to "regulate only the *manner of determining* the defendant's culpability." *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004). Instead it is a rule of substantive criminal law—the law that "declares what conduct is criminal and prescribes the punishment to be imposed for such conduct." 1 Wayne L. LaFave, *Substantive Criminal Law* § 1.2, at 11 (2003). *Johnson* is one of the clearest examples of such a rule: It changed the permissible outcomes in a criminal proceeding from one range (15 to life) to a wholly distinct range (0 to 10), meaning that *any* person whose enhanced sentence depended upon the residual clause is facing a penalty that could not have been imposed. The recognition of such rules as substantive goes to the heart of habeas corpus: To provide relief for persons whose confinement is not authorized by law.

Ignoring the Court's simple and principled framework, Amicus offers a new framework that looks to whether the "source" of a given constitutional rule is "substantive" because it renders certain conduct "constitutionally immune from punishment." Amicus Br. 1, 21-22. In direct conflict with that test, this Court has given retroactive effect to rules that do not involve any constitutionally immune conduct, *see, e.g.*, *Bousley*

v. United States, 523 U.S. 614, 620-21 (1998); Pet. Br. 30-32, 34-35 (citing additional cases), and has denied retroactive effect to rules that are based on substantive constitutional guarantees, *see, e.g.*, *Sawyer v. Smith*, 497 U.S. 227 (1990) (rule based on Eighth Amendment). Perhaps for that reason, Amicus at times extends her "source" test to encompass constitutional rules that do not render any conduct immune from punishment, such as those based on equal protection—leaving no clear principle to distinguish which sources are procedural and which are substantive.

Even stretched in this manner, Amicus's "source" test cannot account for several well-settled cases and requires an addendum for rules adopted "in furtherance of congressional intent." Amicus Br. 40. Like the "source" test, however, this addendum has nothing to do with whether a person is or is not unlawfully confined. Although Amicus justifies the inquiry into "congressional intent" in terms of special separation-of-powers concerns, a court that imposes a penalty not authorized by any lawful statute exceeds its judicial power at least as much as a court that exceeds the intended scope of a valid statute. Furthermore, giving retroactive effect to rules that narrowly interpret a substantive criminal statute, but not to rules that invalidate the statute, would lead to a highly anomalous result: A decision interpreting a statute to *avoid* vagueness would be retroactive, *see, e.g.*, *Skilling v. United States*, 561 U.S. 358, 368 (2010) (construing a substantive criminal statute narrowly to avoid "a vagueness shoal"), but a decision that goes the additional step of finding the law "'so standardless'"

that it must be invalidated, *see id.* at 415-16 (Scalia, J., concurring), would not.

Since *Johnson* was decided nine months ago, district courts in at least seven circuits have been releasing or resentencing persons under *Johnson* on collateral review. Contrary to Amicus's warnings, the sky has not fallen. And Amicus's argument that those remaining in prison should be required to stay beyond the lawful statutory maximum for their offense—because they had "fair notice" or because *Johnson* may affect other statutes—is an attack on *Johnson* itself, which firmly rejected each of those contentions, not on *Johnson*'s retroactivity.

Retroactivity doctrine serves the fundamental purpose of identifying when a person is facing confinement that was not authorized by the substantive criminal law—an inquiry that has nothing to do with the "source" of a rule or whether Congress *meant* to subject that person to unlawful confinement. *See, e.g.*, *Ex parte Yarbrough*, 110 U.S. 651, 654 (1884). This Court has never in its history held that habeas relief may be denied to a person whose punishment was authorized by an unconstitutional law who properly sought such relief, and it should not do so now.

ARGUMENT

I. The Standards Adopted By This Court, Together With Amicus's Concessions, Dictate That *Johnson* Is Substantive, Not Procedural.

Amicus's brief misconceives this Court's retroactivity jurisprudence. To begin with, although Amicus repeatedly asserts that *Teague* created a general bar to retroactivity, subject to "two narrow exceptions," Amicus Br. 1, 12, 18, 49, this Court has repudiated that understanding, *see, e.g.*, *Schriro*, 542 U.S. at 352 n.4. Under this Court's precedents, *Johnson* is retroactive unless Amicus can show that it falls within *Teague*'s "bar on retroactive application of procedural rules." *Id.*

1. "Procedural rules," this Court recently explained, are those that "enhance the accuracy of a conviction or sentence by regulating 'the *manner of determining* the defendant's culpability.'" *Montgomery v. Louisiana*, 136 S. Ct. 718, 730 (2016) (quoting *Schriro*, 542 U.S. at 353). Accordingly, the Court applies a simple test to determine whether a rule is procedural: If a court had employed "'impeccable factfinding procedures'" and "flawless sentencing procedures," would the judgment reached be a permissible outcome? *Id.* (quoting *United States v. U.S. Coin & Currency*, 401 U.S. 715, 724 (1971) (Harlan, J.)). If yes, the rule is procedural and subject to *Teague*'s bar, unless it is a "watershed" rule.

Amicus does not dispute that by holding the residual clause facially unconstitutional, *Johnson* barred any court from imposing punishment under it, no matter what procedures the court employs. Amicus

Br. 24-25. Based on that concession alone, *Johnson* cannot be a "procedural" rule. Amicus's conclusion that *Johnson* is "procedural" must instead turn on the novel notion that "procedural rules" are those grounded in "process-based values," Amicus Br. 14—a notion that lacks any relation to the purposes of habeas review and is unworkable, *see infra* Part II.

2. It is equally clear under this Court's retroactivity jurisprudence that *Johnson* is a substantive rule. That definition is also straightforward: "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 353.[1] "Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." *Id.* at 352 (quoting *Bousley*, 523 U.S. at 620); *Montgomery*, 136 S. Ct. at 734. Amicus does not dispute that *Johnson* "necessarily carr[ies] a significant risk" that a defendant is imprisoned without the authority of a valid statute. Indeed, she does not once mention the Court's "significant risk" standard, which flatly contradicts her assertion that an "effects-based analysis is inappropriate" when assessing a rule's retroactivity. Amicus Br. 41 n.9. Because *Johnson* altered the lawful

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[1] Amicus asserts that this definition is merely an "out-of-context fragment[]" because it makes no reference "to congressional intent." Amicus Br. 42. But this Court has never suggested that the character of a rule turns on "congressional intent"—a restriction that would be arbitrary and unworkable, *see infra* Part II.C.

range of sentences for persons whose sentences depended on the residual clause—from 15 years' to life imprisonment, to 0 to 10 years' imprisonment—those persons necessarily "face[d] a punishment that the law cannot impose." *Schriro*, 542 U.S. at 352. Accordingly, *Johnson* is a substantive rule of criminal law.

Amicus argues that the Court's framework would lead to retroactivity "*whenever* [this Court] deems a law 'unconstitutional.'" Amicus Br. 16, 34. That is wrong. Under the principles above, only the narrowing or invalidation of "*a substantive federal criminal statute*"—i.e., a statute that defines the criminal proscriptions and/or punishments to which persons are subject—is retroactive. *Bousley*, 523 U.S. at 620 (emphasis added); *Montgomery*, 136 S. Ct. at 731 ("A penalty imposed *pursuant to an unconstitutional law* is no less void because the prisoner's sentence became final before the law was held unconstitutional." (emphasis added)). Such rules go directly to "the doctrinal underpinnings of habeas review," which serve to ensure that there is some valid legal basis for a person's ongoing confinement. *Bousley*, 523 U.S. at 621. The invalidation of a criminal statute that governs trial procedure, on the other hand, is procedural and nonretroactive. *See, e.g.*, *Schriro*, 542 U.S. at 354 (invalidation of law requiring judge to find aggravating factors is procedural because "the range of conduct punished by death in Arizona was the same before ... as after").[2]

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[2] Indiana's amicus brief incorrectly suggests that retroactivity will somehow affect AEDPA's procedural requirements. *See* Br. of

In arguing that *Lambrix v. Singletary*, 520 U.S. 518 (1997), is inconsistent with the principles above, Amicus misstates the facts of *Lambrix* and *Espinosa v. Florida*, 505 U.S. 1079 (1992). Both cases involved Florida's death penalty scheme, under which a jury was instructed to weigh statutory aggravating and mitigating circumstances and then render an "advisory sentence" of life imprisonment or death. *Lambrix*, 520 U.S. at 525-26. Whether a jury recommended life or death, the trial court then conducted an independent weighing of the aggravating and mitigating circumstances, giving "great weight" to the jury's advisory sentence. *Id.* In both *Espinosa* and *Lambrix*, the trial court had imposed death based on an appropriately narrowed construction of the "especially heinous, atrocious, or cruel" aggravating factor. *Id.* at 526, 532 & n.4; *Espinosa*, 505 U.S. at 1082. *Espinosa* held that failure to instruct the jury as to the narrowing construction of the aggravating factor "tainted the trial court's sentence because the trial court gave deference to the jury verdict." *Lambrix*, 520 U.S. at 528. Thus, *Espinosa did not* "invalidate[] an aggravating factor," Amicus Br. 28; it held that an improperly instructed jury's recommendation might indirectly affect a trial court's conclusion that death—a concededly lawful outcome—was appropriate. *Lambrix*, 520 U.S. at 525-28. Because the error in

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Indiana et al. 12-13. A claim seeking the benefit of a retroactive rule is equally subject to AEDPA's procedural hurdles, including, in the case of state prisoners, exhaustion of state remedies and demonstrating a violation of "clearly established" federal law under 28 U.S.C. § 2254(d)(1).

Espinosa concerned only the processes for reaching the trial court's ultimate determination, and not the defendant's eligibility for the punishment he received notwithstanding those processes, *Lambrix* held that *Espinosa* was a procedural rule that is not retroactive. *Id.* at 539.

This Court's precedents thus dictate that *Johnson* is a substantive rule that should apply retroactively.

II. The Court Should Not Abandon Its Straightforward and Principled Approach In Favor Of Amicus's Novel "Source" And "Congressional Intent" Tests.

Amicus's proposal would abandon the Court's principled approach and determine whether a rule is "substantive" based on an inquiry that has nothing to do with whether a person's punishment was authorized by a "substantive federal criminal statute." *Bousley*, 523 U.S. at 620. Instead, Amicus's test is based on "the constitutional *source*" of a new rule. Amicus Br. 30. To apply this test, one must identify the "source" of a constitutional rule (at some undefined level of generality) and then determine whether that particular provision of the Constitution (or subpart thereof) represents a "substantive categorical guarantee"—perhaps, though not necessarily, because it renders certain conduct "constitutionally immune from punishment." *Id.* at 1, 14, 21-22. However, because this "source" test cannot accommodate several of this Court's settled precedents, Amicus devises an ad hoc "separate subcategory" for rules adopted "in furtherance of congressional intent," which would automatically be deemed "substantive." *Id.* at 40.

A. The "Source" Test Has No Foundation In Principles Or Precedents Related To Habeas Corpus.

Amicus derives the "source" test principally from a passage in Justice Harlan's *Mackey* opinion explaining that nonretroactivity would be appropriate only in the case of certain "'procedural due process' rules," as opposed to "'substantive due process' rules." *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring); Amicus Br. 20. However, Justice Harlan specifically defined the "'procedural due process' rules [he had] in mind," as a class of rules whose defining feature was not their source, but that they were "*applications* of the Constitution *that forbid the Government to utilize certain techniques or processes* in enforcing concededly valid societal proscriptions on individual behavior." *Mackey*, 401 U.S. at 692 (emphasis added). Moreover, Justice Harlan explained, the same rule can "have both procedural and substantive ramifications, as [he] ha[d] used those terms," *id.* at 692 n.7—a notion that is incompatible with Amicus's contention that a rule's character turns on its source, not on its effects.

Indeed, the "source" test directly conflicts with the outcomes Justice Harlan reached in *Mackey* and in *United States v. U.S. Coin & Currency*, 401 U.S. 715 (1971), which were decided on the same day. Both cases involved the same new rule—that the government cannot compel a person to report gambling activities through the tax law—which stemmed from the same "source," the Fifth Amendment right against self-incrimination. In *Coin & Currency*, the defendant

claimed that this rule rendered unlawful his conviction for failing to report gambling activities. 401 U.S. at 716-17. Writing for the Court, Justice Harlan held the rule retroactive because the claim was not "concerned with the implementation of a procedural rule," but with punishment that could not be imposed in the first place. *Id.* at 723-24. In *Mackey*, the petitioner invoked the same rule to argue that his tax returns should have been excluded at trial. 401 U.S. at 701. There, Justice Harlan concluded that retroactivity was *not* warranted because the rule concerned only "the procedures utilized in procuring [the] conviction." *Id.* It is difficult to imagine a better controlled experiment to refute the hypothesis that a rule's retroactivity depends on its source rather than its effect.

Although Amicus repeatedly states that this Court's post-*Teague* cases have "consistently focused on the constitutional source of a new rule," that is incorrect. Amicus Br. 14, 30. To the contrary, in *Teague*, the Court discarded the approach to retroactivity it had adopted in *Linkletter v. Walker*, 381 U.S. 618 (1965), which turned on an "examin[ation of] the purpose" underlying a rule and gave rise to arbitrary and inconsistent results. *Teague v. Lane*, 489 U.S. 288, 302-03 (1989). The Court explained that "'[t]he relevant frame of reference ... is *not the purpose of the new rule whose benefit the [defendant] seeks*, but instead the purposes for which the writ of habeas corpus is made available.'" *Id.* at 306 (quoting *Mackey*, 401 U.S. at 682 (alteration in original)).

The only post-*Teague* citation Amicus offers to support her "source" test is a single sentence from

Schriro that does not actually support her proposition. Amicus Br. 43. In *Schriro*, this Court reasoned that *Ring v. Arizona*, 536 U.S. 584 (2002), "did not alter the range of conduct Arizona law subjected to the death penalty" because "[i]t could not have; it rested entirely on the Sixth Amendment's jury-trial guarantee, a provision that has nothing to do with the range of conduct a State may criminalize." 542 U.S. at 353. Contrary to Amicus's inference, this reasoning confirms that a rule's retroactivity turns on whether its effect is to alter the range of circumstances subject to penalty. The Court's reasoning that *Ring* did not have that effect because the constitutional right upon which it relied "could not" have that effect is unremarkable. Here, on the other hand, no one disputes that *Johnson* facially invalidated the residual clause, changing the permissible range of punishment from 15 years to life to 0 to 10 years.

The few post-*Teague* cases addressing rules grounded in the Due Process Clause also contradict Amicus's assertion that retroactivity turns on whether such rules are grounded in procedural or substantive due process. In *Goeke v. Branch*, 514 U.S. 115 (1995) (per curiam), for instance, the Eighth Circuit had granted habeas on the basis that Missouri's fugitive dismissal law "violated the defendant's substantive rights under the Fourteenth Amendment." 514 U.S. at 117. Assuming the legitimacy of that substantive due process rule, this Court reversed, holding that it was

procedural under *Teague* and thus not retroactive—a result that cannot be squared with Amicus's test.[3]

Indeed, this Court's post-*Teague* cases confirm that a rule's "source" need not even lie within the Constitution. *Bousley*, 523 U.S. at 620-21. What unifies all substantive rules is their particular "ramification": They "necessarily carry a significant risk" that a defendant suffered a punishment that could not have been lawfully imposed upon him. *Id.* That, the Court has explained, is why conduct-protecting rules are classified as substantive and also why rules "holding that a substantive federal criminal statute does not reach certain conduct" are substantive. *Id.* It is why *Johnson*—which altered the lawful range of punishment from 15 years to life to 0 to 10 years—is substantive as well. *See id.*; *Schriro*, 542 U.S. at 351-52.

B. Amicus Cannot Offer A Coherent Theory For Discerning Which "Sources" Produce Substantive Rules.

Amicus proceeds as though the distinction between a procedural and a substantive "source" is self-evident, offering little direction as to how the Court would sort between the two. In fact, this approach would require

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[3] None of the remaining post-*Teague* cases addressing rules grounded in the Due Process Clause considered relevant whether the rule derived from substantive or procedural due process. They instead considered whether the rule had the effect of "'decriminaliz[ing]' any class of conduct" or preventing certain punishment. *Gilmore v. Taylor*, 508 U.S. 333, 345 (1993); *Gray v. Netherland*, 518 U.S. 152, 170 (1996); *O'Dell v. Netherland*, 521 U.S. 151, 156-57 (1997).

the Court to overrule well-settled case law and create new, arbitrary distinctions between constitutional rights.

At several points, Amicus suggests that the "source" inquiry is simple: Does a given constitutional provision "place[] 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'"? *Teague*, 489 U.S. at 307 (quoting *Mackey*, 401 U.S. at 692-93); *see* Amicus Br. 1, 12-13, 44. This theory rests on an implausibly narrow reading of Justice Harlan's opinions, *see* Pet. Br. 29-35, and, like the "source" test itself, it is irreconcilable with this Court's recognition that decisions narrowing a substantive criminal statute's scope are retroactive. *Bousley*, 523 U.S. at 620-21. Adopting Amicus's rule would entail overruling a heap of other cases as well.

For example, this Court has held that numerous rules grounded in the Eighth Amendment are not retroactive because they affect only trial procedures. *See, e.g.*, *Saffle v. Parks*, 494 U.S. 484, 494-95 (1990); *Sawyer*, 497 U.S. 227; *Graham v. Collins*, 506 U.S. 461 (1993); *Lambrix*, 520 U.S. 518; *Beard v. Banks*, 542 U.S. 406 (2004). Faithfully applied, Amicus's test would hold that these rules—whose source is undoubtedly a substantive guarantee—are retroactive. The same problem arises regarding other constitutional rights that place conduct beyond the government's power to proscribe. *See, e.g.*, *supra* 9-10 (discussing the contrasting results of *Mackey* and *Coin & Currency*); *Dawson v. Delaware*, 503 U.S. 159, 160 (1992)

(admission of evidence of gang membership at capital sentencing barred by First Amendment).

Perhaps for this reason, at other points in her brief, Amicus does not adhere to the "power to proscribe" interpretation of her "source" rule. For instance, Amicus takes for granted that certain Eighth Amendment rules would be found "procedural" in source. *See* Amicus Br. 29, 31. But how is one to determine whether the relevant facet of a quintessential substantive protection, like the right against cruel and unusual punishment, is a "procedural" source? Logically, the answer should be by asking whether the rule has the effect of regulating "only the *manner of determining* the defendant's culpability," *Schriro*, 124 U.S. at 353—a principle that Amicus cannot adopt because it would amount to abandoning the "source" test altogether.

This fundamental problem with Amicus's "source" test is also demonstrated by her arbitrary assessment that certain constitutional rights have a substantive "source" even though they do not make any conduct immune from regulation. The Equal Protection Clause, for instance, does not place conduct beyond the power of the state to criminalize, provided that the state exercises its power evenhandedly—a point that both Petitioner and the Government made and Amicus does not dispute. Pet. Br. 34; US Br. 34. If Amicus were true to her "power to proscribe" theory, she would thus conclude that equal-protection-based rules cannot be substantive. Yet Amicus insists, without explanation, that cases like *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Crowley v. Christensen*, 137 U.S. 86 (1890),

involved the "*substantive* right to equal protection." Amicus Br. 45.

Many other constitutional provisions also protect individual rights not by limiting *what* conduct the government may proscribe but by regulating *how* it may do so. *See, e.g.*, U.S. Const. art. I, § 9, cl. 3 (ex post facto); *id.* (bill of attainder); *id.* amend. V (double jeopardy). Which of these other provisions would Amicus selectively recognize as substantive in "source"?

Amicus's theory also conflicts with *Ex parte Siebold*, 100 U.S. 371 (1880), which, this Court recently explained, "addressed why substantive rules must have retroactive effect regardless of when the defendant's conviction became final." *Montgomery*, 136 S. Ct. at 730; *see Mackey*, 401 U.S. at 693 n.8. Although Amicus suggests that *Siebold* involved Congress's power to proscribe conduct, Amicus Br. 44-45, the *Siebold* petitioners *conceded* that their underlying conduct—"the offence commonly known as 'stuffing the ballot-box'"—was not constitutionally protected conduct. 100 U.S. at 379. They argued only that the statute of conviction was unconstitutional because the Elections Clause did not give Congress the "power to make partial regulations" governing elections. *Id.* at 382. By reading Justice Harlan's category of substantive rules as limited to constitutional immunities, Amicus implies that Justice Harlan sought to overturn the very historical precedent upon which he relied—and upon which this Court recently relied, notwithstanding the

same criticisms Amicus raises here. *See Montgomery*, 136 S. Ct. at 748-49 (Thomas, J., dissenting).[4]

The difficulties in applying the "source" test are manifest here. Contrary to Amicus's assertions, it is far from clear that vagueness is rooted in "process-based values." Amicus Br. 14. While Amicus attempts to reduce vagueness to a right to "notice," *id.* at 25-26, this Court has repeatedly said otherwise: "[T]he more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith v. Gougen*, 415 U.S. 566, 574 (1974)); *see also* M. Cherif Bassiouni, *Substantive Criminal Law* 55 (1978). Vagueness doctrine affords the substantive guarantee that persons will not be deprived of "life, liberty, or property under a criminal law ... so standardless that it

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[4] Amicus's attempt to discount historical precedents is unavailing. For example, she cites this Court's statement in *Montgomery* that *Siebold* "does not directly control," Amicus Br. 48, but that statement was made with respect to the jurisdictional issue in *Montgomery*, which *Siebold* (a federal case) could not have addressed. *See* 136 S. Ct. at 731. More broadly, the extensive historical record recounted in Petitioner's opening brief establishes that habeas has always been open to claims of the kind at issue here without regard to retroactivity. Pet. Br. 30-32 & n.12. The limit on retroactivity urged by Justice Harlan and adopted in *Teague* was, as Amicus acknowledges, a response to the recognition of new procedural protections "in the 1950's and 1960's" (Amicus Br. 19), which gave rise to claims that historically would not have been cognizable in habeas at all. It was not intended to take away the core instances for which "the writ has historically been available," *Mackey*, 401 U.S. at 682-83, 692-93.

invites arbitrary law enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015); *see Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) ("the substantive due process guarantee protects against government power arbitrarily and oppressively exercised").

This more complete understanding of vagueness doctrine makes Amicus's distinction between equal protection and vagueness untenable: If a right precluding administration of the law "with an evil eye and an unequal hand" (*Yick Wo*, 118 U.S. at 373-74) is a substantive "source," why not a right precluding administration in a manner that is "so standardless that it invites arbitrary enforcement" (*Johnson*, 135 S. Ct. at 2556)? *See also* 1 LaFave, *supra*, § 2.3(c), at 150 ("The objection to a vague statute, then, is akin to a claim of denial of equal protection in law enforcement[.]"). This distinction is particularly difficult to comprehend in the context of the Fifth Amendment's Due Process Clause, which is the source of both equal protection and vagueness challenges to federal laws.

In sum, Amicus's rigid "constitutional immunity" formulation cannot account for this Court's precedent and, upon abandoning it, she leaves the Court with no discernible rule for distinguishing between substantive and procedural sources at all.

C. The "Congressional Intent" Test Similarly Lacks Any Basis In Principle Or Precedent And Would Lead To Arbitrary Outcomes.

In *Bousley* and in *Schriro*, the Court made perfectly clear why a decision narrowing the scope of a criminal

statute is a substantive rule: It alters the substantive criminal law. *Bousley*, 523 U.S. at 620-21; *Schriro*, 542 U.S. at 353. Amicus cannot accept that account, however, because it would plainly dictate that *Johnson* is substantive as well. *See supra* Part I.

Instead, Amicus says that statutory holdings are retroactive because they are "in furtherance of congressional intent." Amicus Br. 40. This Court has never adopted this rationale—in fact, it does not appear that *any* court has adopted this rationale. That is for good reason: When a person is subject to confinement that is not authorized by a valid law, that confinement is unlawful irrespective of what Congress *meant* to do.

Amicus justifies her "congressional intent" subcategory on the basis of a special "separation-of-powers" rationale. Amicus Br. 40. But the separation-of-powers concerns implicated when a court imposes punishment that exceeds the scope of a valid statute are no greater than when a court imposes punishment that is not authorized by *any* valid statute. *See Bousley*, 523 U.S. at 620-21 ("[I]t is only Congress, and not the courts, which can make conduct criminal."). Indeed, separation-of-powers concerns are particularly acute in the context of vagueness. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (explaining that "[a] vague law impermissibly delegates basic policy matters" to courts); *Kolender*, 461 U.S. at 358 n.7.

Amicus's "congressional intent" test also yields untenable results. "[B]efore striking a federal statute as impermissibly vague, [the Court] consider[s]

whether the prescription is amenable to a limiting construction." *Skilling*, 561 U.S. at 405. In *Skilling*, for example, the Court avoided invalidating the honest-services statute on vagueness grounds by limiting the statute to its "core" conduct of "*at least* bribes and kickbacks." *Id.* at 408. Under Amicus's theory, *Skilling* (unlike *Johnson*) would thus be a substantive rule, because it "interpreted" the statute rather than invalidating it. Yet that would be anomalous. It would mean that so long as the Court leaves one application standing, narrowing a statute will have retroactive effect and all persons outside the "core" will be eligible for relief; but if the Court goes further and invalidates even the final core application (as three Justices would have done in *Skilling*), its holding will *not* be retroactive to those very same people. Such arbitrariness is untenable.

Additional problems with Amicus's "congressional intent" test are apparent from her use of it as a catch-all for non-statutory decisions that she cannot otherwise account for. As Petitioner's opening brief explains, the Court has always granted habeas relief to persons whose punishment could not constitutionally have been imposed, regardless of whether the constitutional rule was settled when their convictions became final. Pet. Br. 32. In *In re Medley*, 134 U.S. 160 (1890), for instance, the Court granted habeas relief to a prisoner who had been sentenced to solitary confinement because that punishment violated the Ex Post Facto Clause. Amicus claims, without explanation, that such cases are justified under the 'congressional intent' test. Amicus Br. 46 n.10. That

characterization of *Medley* is implausible: The Court specifically held that the punishment "to which the prisoner was subjected by the statute of Colorado ... is forbidden by this provision of the constitution of the United States." 134 U.S. at 171. In Amicus's terms, therefore, the Court "recognized [Colorado's] intent but *overrode* it." Amicus Br. 41. The arbitrary classification of such decisions further confirms the indeterminacy of Amicus's system.

III. Amicus Overstates The Consequences Of Concluding That *Johnson* Is Retroactive.

Since *Johnson* was decided nine months ago, the First, Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have been releasing or resentencing persons under *Johnson* on collateral review. *See* Pet. Br. 11 nn.3-4. Those circuits alone accounted for approximately 70% of ACCA-enhanced defendants in 2014.[5] In many cases, petitioners and the government have simply filed joint emergency motions for relief, leading to prompt release from unlawful confinement or resentencing.[6] *See also* Amicus Br. of Scholars of Fed. Courts 27-33 (describing the limited burden caused by *Johnson*'s retroactivity). Contrary to Amicus's warning, the sky has not fallen.

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[5] U.S. Sentencing Comm'n, *"Crime of Violence" and Related Issues Public Data Briefing*, at 27 (Nov. 10, 2015), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20151105/COV_briefing.pdf.

[6] *See* Petition for Writ of Habeas Corpus 12-13, *In re Sharp*, No. 15-646 (U.S. Nov. 16, 2015) (citing numerous examples across these circuits).

Amicus argues that persons who have not yet been afforded relief under *Johnson* should be required to carry out sentences exceeding the lawful statutory maximum for their offense because affording them relief would lead to "problematic consequences." Amicus Br. 49. The implications of that argument are extremely troubling. Society has no interest "in permitting the criminal process to rest at a point where it ought properly never to repose." *Montgomery*, 136 S. Ct. at 732 (quoting *Mackey*, 401 U.S. at 693).

In any case, Amicus's arguments are an attack on *Johnson* itself, not its retroactivity. First, Amicus argues that "many" of the predicate convictions to which the residual clause was applied did not involve the "notice problems at issue in *Johnson*." Amicus Br. 50. But that contradicts *Johnson*, which invalidated the residual clause precisely because it was "shapeless," "'nearly impossible to apply,'" and "'at best could be only guesswork.'" 135 S. Ct. at 2560. Moreover, the same decisions of this Court that Amicus relies upon to show "fair notice," Amicus Br. 50, were described by *Johnson* as "confirm[ing] its hopeless indeterminacy," "offer[ing] no help at all," and leaving "'a black hole of confusion and uncertainty.'" 135 S. Ct. at 2558, 2562. Furthermore, the Court explained that the "easy" examples cited by the dissent, and echoed by Amicus here, in fact "turn out not to be so easy after all." *Id.* at 2560-61.

Second, Amicus argues that *Johnson* might be applied to strike down other statutes, citing the same statutes that the government and dissent cited in *Johnson* itself—an argument that the Court, again,

rejected. *Id.* at 2561 (distinguishing such statutes because they do not tie the standard "to a confusing list of examples" or "to an idealized ordinary case of the crime").[7]

IV. The Court Should Reject Amicus's Attempt To Assert Nonjurisdictional Defenses On Behalf Of The Government.

A. Amicus's Procedural Default Argument Is Meritless.

Amicus argues that the Court should affirm on the basis of procedural default—a nonjurisdictional affirmative defense, *Trest v. Cain*, 522 U.S. 87, 89 (1997), that the government has waived in this case. That would be an extraordinary departure from this Court's precedent.

Petitioner argued vagueness in his *pro se* § 2255 motion, in several *pro se* filings on appeal, and in his

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[7] Amicus exaggerates the degree to which *Johnson*'s retroactivity entails the same for the career offender guidelines. Several circuits have held, as a threshold matter, that vagueness does not even apply to the sentencing guidelines. *See, e.g.*, *United States v. Matchett*, 802 F.3d 1185, 1189 (11th Cir. 2015); *United States v. Tichenor*, 683 F.3d 358, 363-66 (7th Cir. 2012). And, with respect to retroactivity, some courts have distinguished the guidelines because "[u]nlike the ACCA—a statute that shifts the defendant's penalty range and minimum and maximum terms of imprisonment—the Guidelines merely guide the execution of a court's discretion in selecting the appropriate sentence from within an otherwise stagnate range of lawful penalties." *Frazier v. United States*, Nos. 1:14-CV-134-CLC, 2016 WL 885082, at *5-6 (E.D. Tenn. Mar. 8, 2016), *appeal docketed*, No. 16-5299 (6th Cir. Mar. 15, 2016).

certiorari briefing, Pet. Br. 7-10, and the government made the deliberate decision not to assert procedural default at each stage—and, again, in its merits brief before this Court. In light of that deliberate waiver, this Court lacks authority to raise the defense *sua sponte*. *See Wood v. Milyard*, 132 S. Ct. 1826, 1833-34 (2012).

Even had the government asserted this defense, Petitioner would be excused from any default based on *both* (1) cause and prejudice, *see Reed v. Ross*, 468 U.S. 1, 17 (U.S. 1984) (cause is satisfied when a new rule comes by way of a "decision of this Court" that "explicitly overrule[s] one of [its] precedents"), *and* (2) the actual innocence gateway, *see Bousley*, 523 U.S. at 623; Leah M. Litman, *Residual Impact: Resentencing Implications of* Johnson*'s Potential Ruling on ACCA's Constitutionality*, 115 Colum. L. Rev. Sidebar 55, 72 (2015) (courts have "generally coalesced around the idea that a defendant would be actually innocent if a sentencing error resulted in the defendant receiving a sentence above the statutory maximum").

B. Amicus's Elements Clause Argument Is Meritless.

Amicus's argument that the Court can affirm under the elements clause is also unfounded. The government does not contest that it failed to raise this nonjurisdictional issue at the certiorari stage. *See* Pet. Br. at 35-36. Moreover, reasonable jurists could debate whether Petitioner's 1996 Florida robbery convictions qualify under the elements clause. The Eleventh Circuit conceded as much when, on direct appeal, it reviewed Florida law at the time of Petitioner's

convictions and concluded that "[a]rguably the elements clause would not apply." JA 117a.

In any case, Petitioner's Florida robbery convictions do not qualify under the elements clause because they did not require as an element the use of "violent force." *Johnson (Curtis) v. United States*, 559 U.S. 133, 140-41 (2010). As the Eleventh Circuit observed and the government conceded at sentencing, Petitioner was convicted "at a time when the controlling Florida Supreme Court authority held that 'any degree of force'" sufficed to commit robbery, including the mere snatching of an object from a victim's person without any resistance. JA 113a-115a & n.32 (explaining that in the district where Petitioner was convicted the force could be "ever so little"); JA 152a. In other cases, the government has conceded that this form of Florida robbery cannot qualify under the elements clause. *See* Government's Response to § 2255 Motion, at 9-10, *Dieujuste v. United States*, No. 9:15-cv-80618-KLR (S.D. Fla. Aug. 31, 2015), ECF No. 17.

Amicus's argument is premised on *Robinson v. State*, 692 So. 2d 883 (Fla. 1997), which held that robbery can be committed only upon a showing of "resistance by the victim." *Id.* at 886. As the Eleventh Circuit explained on direct appeal, however, *Robinson* was decided after Petitioner's convictions and altered prior controlling authority that "any degree of force" sufficed. JA 113a-115a. In any case, even after *Robinson*, Florida robbery does not require violent force. *See, e.g., Sanders v. State*, 769 So. 2d 506, 507 (Fla. 5th Dist. Ct. App. 2000) (force required to quickly open a victim's hand and snatch cash is sufficient); Pet.

Br. 37 (explaining additional ways in which a conviction for Florida robbery can be obtained without violent force).

Plainly, at a minimum, reasonable jurists could debate whether Petitioner's 1996 Florida robbery convictions qualify under the elements clause and therefore reversal is warranted.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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No. 15-6418

IN THE

Supreme Court of the United States

GREGORY WELCH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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APPENDIX A — RELEVANT DOCKET ENTRIES

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, NO. 14-15733

Date Filed	Docket Text
	* * *
01/30/2015	*MOTION for certificate of appealability filed by Appellant Gregory Welch. Opposition to Motion is Unknown [7400990-1]*
03/27/2015	Document filed by Gregory Welch in support of Motion for certificate of appealability filed by Appellant Gregory Welch in 14-15733 [7400990-2].
	* * *
06/09/2015	ORDER: Motion for certificate of appealability filed by Appellant Gregory Welch is DENIED. [7400990-2]; Motion for appointment of counsel filed by Appellant Gregory Welch is DENIED as MOOT. [7444075-2] CRW
07/07/2015	RETURNED UNFILED: Extension of Time filed by Gregory Welch is returned unfiled because it is untimely.
	* * * *

Appendix A

RELEVANT DOCKET ENTRIES FROM THE U.S. DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA (FORT LAUDERDALE) CIVIL DOCKET FOR CASE #: 0:13-cv-62770-KAM

Date Filed	#	Docket Text
		* * *
12/20/2013	2	MOTION (Complaint) to Vacate Sentence (2255). NOTE: All further docketing is to be done in the civil case. (Criminal Case # 09-60212-CR-MARRA), filed by Gregory Welch.(jc) (Entered: 12/20/2013)
		* * *
02/10/2014	7	RESPONSE TO ORDER TO SHOW CAUSE re 5 Order to Show Cause, by United States of America. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14)(Keene, Jennifer) (Entered: 02/10/2014)

Appendix A

* * *

04/10/2014	15	RESPONSE/REPLY to 7 Answer to Motion (Complaint) to Vacate Sentence (2255) by Gregory Welch. (ar2) (Entered: 04/11/2014)

* * *

09/29/2014	17	REPORT AND RECOMMENDATIONS on 28 USC 2255 case re 2 Motion (Complaint) to Vacate/Set Aside/Correct Sentence (2255) filed by Gregory Welch. Recommending that this motion to vacate be denied on the merits, that any pending motions not otherwise ruled upon be denied as moot, that a certificate of appealability be denied; and, the case closed. Objections to RR due by 10/17/2014 Signed by Magistrate Judge Patrick A. White on 9/29/2014. (tw) (Entered: 09/29/2014)
10/17/2014	18	OBJECTIONS to 17 Report and Recommendations by Gregory Welch. (ar2) (Entered: 10/17/2014)
12/09/2014	19	FINAL JUDGMENT ORDER ADOPTING 17 REPORT AND RECOMMENDATIONS denying 1 petition to vacate pursuant to 2255.

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Certificate of Appealability: DENIED. This case is CLOSED. Signed by Judge Kenneth A. Marra on 12/8/2014. (ir)

* * * *

Appendix A

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, NO. 10-14649

Date Filed	Docket Text
	* * *
03/07/2011	E-Brief Tendered: Appellant brief for Appellant Gregory Welch.
	* * *
04/05/2011	E-Brief Tendered: Appellee brief for Appellee USA.
	* * *
05/09/2011	E-Brief Tendered: Reply brief for Appellant Gregory Welch.
05/17/2011	MOTION to correct or amend brief reply brief. filed by Attorney Brenda G. Bryn for Appellant Gregory Welch. Motion is Unopposed [6307635-1]
	* * *
06/13/2012	Opinion issued by court as to Appellant Gregory Welch. Decision: Affirmed. Opinion type: Published. Opinion method: Signed.
	* * * *

Appendix A

RELEVANT DOCKET ENTRIES FROM THE U.S. DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA (FT LAUDERDALE) CIVIL DOCKET FOR CASE #: 0:09-CR-60212-KAM-1

Date Filed	#	Docket Text
08/20/2009	1	INDICTMENT as to Gregory Welch (1) count(s) 1. FORFEITURE ATTACHED (dd) (Entered: 08/20/2009)
		* * *
06/18/2010	33	Minute Entry for proceedings held before Judge Kenneth A. Marra: Change of Plea Hearing as to Gregory Welch held on 6/18/2010 Gregory Welch (1) Guilty Count 1. Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov (ir) (Entered: 06/18/2010)
06/18/2010	34	VACATED PLEA AGREEMENT/ FACTUAL PROFFER STATEMENT as to Gregory Welch (ir) See DE 42 and 43 Modified on 9/20/2010 (ir). (Entered: 06/18/2010)

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* * *

08/20/2010	37	OBJECTIONS TO PRESENTENCE INVESTIGATION REPORT by Gregory Welch (Birch, Peter) (Entered: 08/20/2010)
09/15/2010	38	SENTENCING MEMORANDUM by Gregory Welch (Attachments: # 1 Appendix)(Birch, Peter) (Entered: 09/15/2010)
09/16/2010	39	NOTICE *of Filing* by Gregory Welch re 37 Objections to Presentence Investigation Report (Attachments: # 1 Attachments)(Birch, Peter) (Entered: 09/16/2010)
09/16/2010	40	SUPPLEMENT to 37 Objections to Presentence Investigation Report filed by Gregory Welch by Gregory Welch (Birch, Peter) Modified on 9/17/2010 (ls). (Entered: 09/16/2010)
09/17/2010	41	RESPONSE to 37 Objections to Presentence Investigation Report by USA as to Gregory Welch (Linder, Jason) (Entered: 09/17/2010)
09/17/2010	42	Minute Entry for proceedings held before Judge Kenneth A. Marra: Change of Plea Hearing as to

		Gregory Welch held on 9/17/2010 Gregory Welch (1) Guilty Count 1. Prior plea of 6/18/10 is VACATED. Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov (ir) (Entered: 09/20/2010)
09/17/2010	43	PLEA AGREEMENT/FACTUAL PROFFER STATEMENT as to Gregory Welch (ir) (Entered: 09/20/2010)
09/17/2010	44	Minute Entry for proceedings held before Judge Kenneth A. Marra: Sentencing held on 9/17/2010 as to Gregory Welch. Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov (ir) (Entered: 09/20/2010)
09/20/2010	45	JUDGMENT as to Gregory Welch (1), Count(s) 1, 180 months BOP, three years supervised release, $100 special assessment. Signed by Judge Kenneth A. Marra on 9/20/2010. (ir) (Entered: 09/20/2010)
09/30/2010	46	NOTICE OF APPEAL by Gregory Welch re 45 Judgment. Within fourteen days of the filing date of a Notice of Appeal, the appellant

must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (Birch, Peter) (Entered: 09/30/2010)

12/14/2010 54 TRANSCRIPT of Change of Plea as to Gregory Welch held on 06/18/2010 before Judge Kenneth A. Marra, 1-25 pages, re: 46 Notice of Appeal - Final Judgment, Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/7/2011. Redacted Transcript Deadline set for 1/18/2011. Release of Transcript Restriction set for 3/17/2011. (sf) (Entered: 12/14/2010)

12/14/2010 55 TRANSCRIPT of Change of Plea and Sentencing as to Gregory Welch held on 09/17/2010 before Judge Kenneth A. Marra, 1-42 pages, re: 46

Appendix A

		Notice of Appeal - Final Judgment, Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/7/2011. Redacted Transcript Deadline set for 1/18/2011. Release of Transcript Restriction set for 3/17/2011. (sf) (Entered: 12/14/2010)

* * *

12/20/2013	72	Motion to Vacate under 28 U.S.C. 2255 by Gregory Welch (civil case number 13-62770-CIV-MARRA.) All further docketing related to the motion to vacate is to be done in the civil case. (jc) (Entered: 12/20/2013)
12/09/2014	73	ORDER denying 72 Motion to Vacate (2255) as to Gregory Welch (1). Signed by Judge Kenneth A. Marra on 12/8/2014. (ir) (Entered: 12/09/2014)

Appendix A

08/28/2015	74	MOTION to Reduce Sentence by Gregory Welch. Responses due by 9/14/2015. (ir) (Entered: 08/28/2015)

* * * *

APPENDIX B — MOTION FOR EXTENSION OF TIME, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JULY 7, 2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
NO. 14-15733-C
0:13-CV-62770-KAM
0:09-CR-60212-KAM-1

GREGORY WELCH,

Petitioner,

v.

UNITED STATES OF AMERICA

Comes now Petitioner Gregory Welch most humbly request for an extension of time based on the fact the Supreme Court ruling in *Johnson v. United States*, 134 S. Ct. 1871 (2015). Petitioner does not have access to the Opinion based on the fact he is unable to receive access to adequate legal material in time to supplement his request. Petitioner basically needs more time to prepare a motion to reconsider based on the fact his conviction is now unconstitutional and he needs more time to prepare his argument because his original request was not heard on any of the merits.

Thank you

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT
OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

July 7, 2015

Gregory Welch
FCI Coleman Medium – Inmate Legal Mail
PO Box 1032
COLEMAN, FL 33521-1032

Appeal Number: 14-15733-C
Case Style: *Gregory Welch v. USA*
District Court Docket No.: 0:13-cv-62770-KAM
Secondary Case Number: 0:09-cr-60212-KAM-1

RETURN UNFILED: Extension of Time filed by Gregory Welch is returned unfiled because it is untimely. The 21 days to file your reconsideration has expired. You may file a motion for reconsideration. You would have to also file a motion to file Out Of Time.

Sincerely,

DOUGLAS J. MINCHER, Clerk of Court

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JUNE 9, 2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-15733-C

GREGORY WELCH,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Gregory Welch moves for a certificate of appealability in order to appeal the denial of his motion to vacate, filed pursuant to 28 U.S.C. § 2255. His motion is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Welch's motion for appointment of counsel is DENIED AS MOOT.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

APPENDIX D — MOTION TO SUPPLEMENT CERTIFICATE OF APPEALABILITY, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED MARCH 27, 2015

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO.: 13-62770-CIV-MARRA
9-60212-CR-MARRA

GREGORY WELCH,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

MOTION TO SUPPLEMENT/ CERTIFICATE OF APPEALABILITY

COMES NOW, Petitioner Gregory Welch, *pro-se*, requests that this Court Grants this Supplement / Amendment pursuant to the Fed. R. Crim. P. Rule 15, governing Supplemental Authority. Welch asks the Court to hold this case in Abeyance until *United States v. Johnson* (13-7120), Welch's request that this Court vacate his ACCA conviction, based on the fact he was sentenced under the "*Residual Clause*" of the ACCA, 924(e)(2)(B)(ii). Welch objected to the ACCA in the District Court, also in this

Court. Pursuant to *United States v. Beckles*, 565 F.3d 832. "undisputed facts that are not objected are accepted as true." Welch objected to the P.S.I. also, to the information that was used to come to the conclusion, which violated *United States v. Shepard*, 544 U.S. 13, non-approved documentation.

CONCLUSION

Petitioner hopes and prays the Honorable Court will GRANT this Supplement / Certificate of Appealability.

Respectfully Submitted,

March 13, 2015
Executed On

/s/
Gregory Welch, #75675-004
FCC-COLEMAN-MEDIUM,
POB 1032
COLEMAN, FLORIDA 33521-1032

APPENDIX E — MOTION FOR CERTIFICATE OF APPEALABILITY, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JANUARY 30, 2015

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO.: 14-15733-C

GREGORY WELCH,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

MOTION FOR CERTIFICATE OF APPEALABILITY TO THE COURT OF APPEALS

COMES NOW, Appellant files this Certificate of Appealability, pro-se. Appellant is a layman of the Law, unskilled in the Law, therefore, request that this Motion for a Certificate of Appealability be construed liberally. *Haines v. Kerner*, 404 U.S. 519 (1972).

Appellant states the following reasons why he should be granted a Certificate of Appealability:

1). Appellant's plea was based on a 1-10 year sentence, however, several months later, Appellant received a plea for 15 years to life. This was after the Appellant had given

up all of his rights and waived all of his statute rights away, based on a 1-10 year plea.[1] Had Appellant known that he was going to be declared as an armed career offender, he would never ever have pled guilty. But would have instead proceeded directly to trial, and proved his innocence in a Court of Law.

2). Counsel had an agreement with the Government for a 0-10 year plea.[2] Which became involuntary, unintelligent and unknowingly when the Government reneged on the plea agreement. *Santobello v. New York*, 404 U.S. 257 (1971). Appellant had already been debriefed about his case and all of that information was included in the plea agreement of the ten year plea agreement. Therefore, when the Government reneged on the plea agreement, of the 1-10 years, it became involuntary, invalid and Appellant should never have been sentenced to 15 years in a Federal prison. See *Santobello v. New York*, 404 U.S. 257 (1971). Appellant's Sixth Amendment rights to effective assistance of counsel was violated when counsel allowed the 0-10 year plea agreement to be breached. Appellant was prejudiced by the breach of the plea agreement and caused the Appellant 15 years in a Federal prison ineffectively. *Strickland v. Washington*, 466 U.S. 466 (1984); *Cronic v.*

---

1. Petitioner's 6th Amendment right was violated when counsel failed to object to the fact under Rule 11(a)(c), once a Plea is accepted only the Court can reject the Plea (NOT the attorney) ONLY the Court.

2. *Lalfer v. Cooper*, 132 S.ct. 1399; *Missouri v. Frye*, 132 S.Ct. 1376, the Court clarified that the Sixth Amendment right to the effective assistance of counsel extends specifically to the negotiation and consideration of Pleas that lapse or are rejected.

United States, 466 U.S. 648 (1984); *Hill v. United States*, 368 U.S. 424-429 (1962); *Lafler v. Cooper*, 132 S.Ct. 1376 (2012); *Missouri v. Frye*, 132 S.Ct. 1399 (2012); *Padilla v. Kentucky*, 130 S.Ct. 1476 (2010); and *Hill v. Lockhart*, 474 U.S. 48-52 (1985). It was as if the United States District Court never even looked at Appellant's argument one. A Certificate of Appealability should issue in this case, based on violations of the Appellant's Fifth Amendment rights to due process and his Sixth Amendment rights to effective assistance of counsel, which prejudiced the Appellant and caused him 15 years in a breached plea agreement. Jurists of reason would say that this case deserves more encouragement and should be developed further. Appellant has shown in this argument one, a denial of his Fifth, Sixth, and Eighth Amendments to due process, ineffective assistance of counsel, and cruel and unusual punishment for the Government to have breached the plea agreement when in fact, it had already agreed to a 0-10 year sentence, and reneged on the agreement and sentenced the Appellant, based on a totally different plea agreement, for which was never the basis of the first plea agreement.

Because Appellant has shown a denial of his Constitutional rights in violation of *Barefoot v. Estelle*, 463 U.S. 880 (1983); *Slack v. McDaniels*, 529 U.S. 473 (2000); and *Miller El v. Cockrell*, 537 U.S. 322 (2003). Appellant request remand of his involuntary, unintelligent, and unknowing plea agreement. Had Appellant known his first plea agreement would be reneged on by the Government, he would have never pled guilty at all and would have proceeded directly to trial and proven his innocence in

a Court of Law. See Appellant's June 18, 2010, first plea agreement, on Page 19 and Page 20, Line 1-9, based on Appellant's 0-10 year plea agreement that was totally breached by the Government and counsel.

Appellant states that he has just shown several Constitutional violations in regards to *Barefoot v. Estell, supra.*; *Miller El v. Cockrell, supra.*; and *Slack v. McDaniels, supra.*

2). Appellant state that his armed career offender status, for State of Florida priors, Docket Nos.: 1996-CF-005680 (Robbery conviction); 1996-CF-001575 (Robbery conviction); and 2003-CF-17694 (Battery). These state priors violate *United States v. Johnson*, 13-720 8th Cir. 526 F.Appx. 708, 2013, in the United States Supreme Court, pending an April, 2015, oral argument briefing. Appellant's state priors, also, violate *Shepard v. United States*, 544 U.S. 13, 26 (2005), because there was no *Shepard* documentation to verify these state priors, as being legally legitimate. See also, *Taylor v. United States*, 495 U.S. 575 (1990), in regards to the categorical approach; and *Descamps v. United States*, 133 S.Ct. 1265 (2010); *Begay v. United States*, 129 S.Ct. 1581 (2008); and *United States v. Day*, 465 F.3d 1265 (11th Cir. 2006).

All of these cases state that Appellant's armed career offender status is unconstitutional and violate the Appellant's Fifth Amendment right to notice of the state priors, and the proper documentation for armed career offender status, for which was never used according to *Shepard, Taylor*, and *Descamps, supras.* Appellant's Sixth

Appendix E

Amendment rights were also violated based on counsel's ineffectiveness, in not pursuing the unconstitutionality of Appellant's career offender status, all the way to the United States Supreme Court, based on improper *Shepard, Taylor, Day,* and *Descamps* requirements that presentedly violate the Appellant's Fifth Amendment rights to due process of proper notice and legally verified state documentation, Appellant's Sixth Amendment right to effective assistance of counsel which prejudiced and caused the Appellant 15 years as an armed career offender when in fact, he was never legally an armed career offender and should never have been declared one, either according to his Fifth, Sixth, and Eighth Amendment rights to cruel and unusual punishment, for which he remains incarcerated, based on an armed career offender status, for which he never was eligible for such status at all according to all of the above stated reasons.

Jurists of reason would agree that this argument deserves further encouragement, and should be developed further. Jurists would also agree that Appellant has shown violations of his Constitutional rights and that they have been violated and denied to the Appellant based on the above stated reasons. And based on *Slack v. McDaniels*; *Miller El v. Cockrell*; and *Barefoot v. Estelle, supras,* Appellant would never have pled guilty had he known his Constitutional rights would be violated in this manner, based on invalid, inadequate, insufficient, and none-certified documentation, that caused the Appellant to be unconstitutionally denied his Fifth, Sixth, and Eighth Amendment rights. Jurists of reason would agree that this claim deserves further encouragement. Based on all

of the above stated reasons, and that Appellant has shown denials of his Constitutional rights, therefore, deserves a Certificate of Appealability.

CONCLUSION

Appellant hopes and prays that he will be granted a Certificate of Appealability and to counsel, based on his indigency status, for which he cannot afford counsel, that is why his Certificate of Appealability is pro-se, and Appellant is a layman of the Law, unlearned in the Law, and therefore request counsel in this case.

January 12, 2015
Executed On

Respectfully Submitted,

/s/_____

Gregory Welch
#73675-004
FCC-COLEMAN-MEDIUM
POB 1032
COLEMAN, FLORIDA
33521-1032

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO.: 14-15733

GREGORY WELCH,

Appellant,

v.

UNITED STATES OF AMERICA,

Respondent.

APPELLANT'S REQUEST FOR APPOINTMENT OF COUNSEL

COMES NOW, Appellant is a layman of the Law, and unlearned in the Law, and because he is unlearned in the Law, and requested the assistance of jail house, pro-se litigant Donald G. Green, #39747-019, Coleman, Unit B-2, Appellant request counsel, based on his indigency status, and layman of the Law status in the Event he is granted a Certificate of Appealability.

CONCLUSION

Appellant hopes and prays for the Appointment of Counsel, based on the above stated reasons.

Appendix E

January 12, 2015
Executed On

Respectfully Submitted,

/s/_____
Gregory Welch
#73675-004
FCC-COLEMAN-MEDIUM
POB 1032
COLEMAN, FLORIDA
33521-1032

APPENDIX F — FINAL JUDGMENT AND REPORT OF MAGISTRATE OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, ENTERED DECEMBER 9, 2014

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-62770-CIV–MARRA
(09-60212-CR-MARRA)

GREGORY WELCH,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

FINAL JUDGMENT AND REPORT OF MAGISTRATE

For the reasons stated in the Report of the Magistrate Judge (DE 17) and upon independent *de novo* review of the file, and over the objections having been filed (DE 18), it is **ORDERED AND ADJUDGED** as follows:

1) The Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge. The petition to vacate pursuant to 28 U.S.C. § 2255 is **DENIED.**

2) Under Rule 11(a) of the Rules 'Governing Section 2255 Proceedings in the United States District Courts, this Court must issue or deny a certificate of appealability when entering a final order adverse to the applicant. Because the Court is adopting the Magistrate Judge's Recommendation denying the motion to vacate brought under 28 U.S.C. § 2255, the Court must consider whether to issue or deny the certificate of appealability at this time.

In order for this court to grant a COA, Movant must make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), such that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). The Court concludes under *Slack* that Movant cannot show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* Therefore, the Court **DENIES** a certificate of appealability. The Court notes that under Rule 22(b)(1) of the Federal Rules of Appellate Procedure, Movant may seek a certificate of appealability from the U.S. Court of Appeals for the Eleventh Circuit.

3) All motions not otherwise ruled upon are **DISMISSED AS MOOT**.

4) The case is **CLOSED**.

DONE AND ORDERED in chambers at West Palm Beach, Palm Beach County, Florida, this 8th day of December 2014.

/s/
KENNETH A. MARRA
United States District Judge

Appendix F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-62770-Civ-MARRA

(09-60212-Cr-MARRA)

MAGISTRATE JUDGE P. A. WHITE

GREGORY WELCH,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

REPORT OF MAGISTRATE JUDGE

I. Introduction

This matter is before this Court on the movant's motion to vacate pursuant to 28 U.S.C. §2255, challenging the constitutionality of his conviction and sentence for possession of a firearm and ammunition in and affecting interstate and foreign commerce entered following a guilty plea in case no. 09-60212-Cr-Marra.

This Cause has been referred to the Undersigned for consideration and report pursuant to 28 U.S.C. §636(b) (1)

(B) and Rules 8 and 10 Governing Section 2255 Cases in the United States District Courts.

The Court has reviewed the movant's motion (Cv-DE#1), together with the government's response (Cv-DE#7) to this court's order to show cause with multiple exhibits, the movant's traverse (Cv-DE#15),[1] the Presentence Investigation Report ("PSI"), the court's Statement of Reasons ("SOR"), and all pertinent portions of the underlying criminal file, including the change of plea and sentencing transcripts.

Construing the movant's §2255 motion liberally as afforded *pro se* litigants pursuant to *Haines v. Kerner*, 404 U.S. 519 (1972), in his motion to vacate (Cv-DE#1), movant challenges the voluntariness of his plea and his ensuing sentence as an armed career criminal. Movant alleges he was denied effective assistance of counsel, where his lawyer allowed him to be sentenced as an armed career criminal thereby making his plea not knowing and voluntary. (Cv-DE#1:4).

---

1. The movant's traverse was also filed on CM/ECF at Cv-DE#14, but it has pages missing. The complete traverse is docketed on CM/ECF at Cv-DE#15.

Appendix F

II. Factual Background and Procedural History

A. Facts of the Offense[2]

The stipulated factual proffer reveals as follows. On March 17, 2009, law enforcement officers searched movant's apartment. (Cr-DE#43). At that time, they discovered a loaded Lorcin, Model L380, .380-caliber, semi-automatic pistol, bearing serial number 532504, in the attack space of the apartment. (*Id.*). The firearm was loaded with six rounds of ammunition, five of which were Winchester, .380-caliber ammunition, and one was a Remington, .380-caliber bullet. (*Id.*). Movant further stipulated that the firearm and all of the ammunition had traveled in interstate or foreign commerce. (*Id.*). Next, he agreed that he was a previously convicted felon. (*Id.*).

B. Indictment, Pre-trial Proceedings, Conviction, Sentencing, and Direct Appeal

On August 20, 2009, the movant was charged by Indictment with felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §922(g)(1).[3] (Cr-

---

2. The facts of this case have been obtained from the factual proffer executed by the movant and made part of the Rule 11 change of plea proceeding. (Cr-DE#43:Factual Proffer; Cr-DE#55:Change of Plea/Sentencing Transcript).

3. The maximum sentence exposure for being a felon in possession of a firearm, in violation of 18 U.S.C. §922(g)(1), is ten years in prison. However, if a felon in possession has three prior convictions for violent felonies or serious drug offenses, then the Armed Career Criminal Act, 18 U.S.C. §924(e), requires a minimum sentence of 15 years imprisonment.

DE#1; Cv-DE#7:Ex.2). On March 29, 2010, the movant filed a pretrial motion to suppress evidence, arguing that the search was unlawful and the evidence seized as a result therefrom should be suppressed. (Cr-DE#16). Following an evidentiary hearing, the court entered an order denying the motion. (DE#31).

On June 18, 2010, movant entered into a negotiated plea agreement, in which he agreed to plead guilty as charged, acknowledging that the firearm and ammunition were found in his apartment, but preserving his right to appeal the court's denial of his motion to suppress. (Cr-DE#54). At that time, the terms of the plea agreement called for a maximum sentence of up to 10 years in prison, for violation of 18 U.S.C. §922(g)(1). (Cr-DE#54:8).

However, on September 8, 2010, movant agreed to vacate his prior plea, and in fact, executed a revised, negotiated written plea agreement, agreeing to plead guilty as charged. (Cr-DE#43). The terms of the agreement were modified in part to reflect movant's agreement and understanding that he faced a minimum of 15 years and up to a maximum of life imprisonment, for violation of §922(g). (*Id.* :2). The movant acknowledged and understood that the court would impose sentence after considering the advisory guidelines, based in part on a PSI, which would be prepared after the plea is entered. (*Id.* :2-3). The movant further acknowledged that the court was not bound to impose a guideline sentence, and was permitted to tailor the sentence in light of other statutory concerns, which may be more or less severe than the guidelines. (*Id.*).

Appendix F

Movant understood that the court had the authority to impose up to the statutory maximum authorized by law for the offense of conviction, and that he could not withdraw his plea solely as a result of the sentence imposed. (*Id.*). In fact, movant understood that the sentence had not yet been determined by the court, and any estimate of the probable sentencing range or ultimate sentence from either defense counsel, the government, or the probation office was a prediction, not a promise, and therefore, not binding on the government, the probation office, or the court. (*Id.* :6-7). He also indicated he had entered into the plea freely and voluntarily, and that no threats or promises, other than as contained in the written agreement, were made to induce him to change his plea to guilty. (*Id.* : 7).

Although acknowledging it would not be binding on the probation officer or the court, the parties agreed to jointly recommend up to a three level reduction to movant's base offense level based on his timely acceptance of responsibility. (*Id.* :4-5). As part of the modified agreement, the government also consented to the movant's entry of a conditional guilty plea, allowing movant to reserve the right to appeal the denial of his motion to suppress physical evidence. (*Id.* :8).

Movant also stated that there was sufficient evidence to convict him of the charged offense, as follows. (*Id.* : 5-6). On March 17, 2009, his apartment was searched by law enforcement. (*Id.*). At that time, they discovered in the attic space a loaded Lorcin, Model L380, .380-caliber semi-automatic pistol, bearing serial number 532504. (*Id.*). The firearm contained six rounds of ammunition.

(*Id.*). Five of the rounds were Winchester and one was a Remington. (*Id.*).

On September 17, 2010, movant appeared for a new change of plea proceeding. (Cr-DE#55). At that time, the government explained that when movant initially entered his change of plea in June 2010, neither party had contemplated that the movant qualified as an armed career criminal. (*Id.* :2). As a result, the movant was not advised that his maximum exposure was significantly greater than 10 years. (*Id.* :2-3). As a result, the government stated that the parties had recently executed another written plea agreement similar to the prior agreement. (*Id.*). The new agreement was modified to reflect the fact that movant faced a 15-year minimum mandatory and up to a term of life imprisonment for the charged offense. (*Id.* :3). Further, the modified agreement permitted movant to enter a conditional guilty plea, omitted the appellate waiver contained in the prior agreement, thereby enabling him to appeal the denial of his suppression motion, along with the lawfulness of the sentence to be imposed. (*Id.* :3). The court then asked defense counsel whether the government's representations were correct, to which counsel responded that the movant potentially faced an enhanced sentence as an armed career criminal, but movant was reserving the right to litigate the validity of the enhancement at sentencing. (*Id.*).

Thereafter, the district court conducted a careful and meticulous plea colloquy pursuant to Fed.R.Cr.P. 11. (Cr-DE#55). After movant was given the oath, he was cautioned by the court that if he made any false statements

during the proceedings, it could be used against him in a prosecution for perjury. (*Id.* : 3). Movant then provided background information regarding his age, educational background, and whether he could read and write English. (*Id.* : 4-5).

Movant understood and agreed to set aside his previously entered guilty plea, and to go forward with a new, modified written plea agreement. (*Id.* :6). Movant acknowledged that the new plea agreement allowed him to appeal the sentence imposed, as well as, the court's ruling on movant's motion to suppress. (*Id.*). When asked if, in fact, he wanted to set aside the prior plea, and enter into the new plea agreement, movant responded that he did. (*Id.*). Movant indicated he had consulted with his attorney about this decision, and they were both in agreement on proceeding with the new plea agreement. (*Id.*). When asked again whether he believed the case should be resolved based on the new agreement with the government, movant indicated that it should. (*Id.* :8).

Movant further acknowledged reviewing and discussing with counsel the Indictment, along with the government's evidence against him. (*Id.* :7). He also indicated he discussed possible defenses with counsel, and acknowledged counsel had done more than he had anticipated for him, and had provided more than competent advice. (*Id.* :8). He stated there was nothing further he had wanted done by counsel to defend against the charge. (*Id.*).

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Movant testified that he read the new agreement and then fully and completely discussed it with his attorney. (*Id.* :8). He denied anyone threatening or forcing him to change his plea from not guilty to guilty, stating he was doing so freely and voluntarily. (*Id.* :9). Next, again acknowledged the charge against him, as set forth in the Indictment, and further understood that given his criminal history, he may be subject to an enhanced sentence, exposing him to a 15-year minimum and up to a maximum of up to life imprisonment. (*Id.* :10). He acknowledged that the sentence would be imposed after the court considered the advisory guideline sentence, as set forth in the PSI, which had already been prepared. (*Id.* :11-12). He also acknowledged that after the Rule 11 proceeding, there would be a discussion with the court concerning his disagreement with the contents of the PSI, and in particular, with the recommendation that movant receive an enhanced sentence as an armed career criminal. (*Id.* :12). Movant further understood that his guideline range would be reduced three levels based on his timely acceptance of responsibility. (*Id.* :13). He also acknowledged that the guidelines were not binding or mandatory, and that the court would be able to fashion a sentence above or below the guideline range. (*Id.* :15-16).

Movant also acknowledged and agreed with the accuracy of the facts as set forth in paragraph 10 of the written plea agreement. (*Id.* :13). He indicated those facts support the charge to which he was pleading guilty. (*Id.* :14). He also acknowledged his agreement to forfeit any claim of ownership or title to the firearm and ammunition seized in connection with the case. (*Id.*).

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Notably, movant understood he was entering into a conditional plea because he had reserved the right to appeal the denial of his motion to suppress, along with the lawfulness of the sentence to be imposed. (*Id.* :14). Movant again denied being made any promises or representations, other than set forth in the plea agreement as to the ultimate sentence to be imposed. (*Id.* :16).

Movant acknowledged and understood that by pleading guilty, he was waiving his right to a jury trial and to call witnesses, present evidence, testify on his own behalf, etc. (Id. :18-20). Movant further understood that if the court accepted the plea, he would also lose valuable civil liberties, and that the plea could have additional collateral consequences, including deportation, if he were not a United States citizen. (*Id.* :20.). Next, when asked by the court how he wished to plead, movant stated, "Guilty, sir." (*Id.* :20).

As a result of the foregoing, the court found the movant was fully competent and capable of entering into an informed plea, that he was aware of the nature of the charge and consequences of the plea, that his plea was knowing and voluntary, and supported by an independent basis in fact as to each of the essential elements of the offense. (*Id.* :21). Thereafter, the court accepted movant's plea, and adjudicated him guilty of the offense charged in the Indictment. (*Id.*).

The PSI prepared for sentencing which reveals as follows. The probation officer set the base offense level at 24, pursuant to U.S.S.G. §2K2.1(a)(4)(A), because the

offense of conviction involved possession of a firearm by a convicted felon who had committed the offense of conviction after having at least two prior felony convictions of crimes of violence. (PSI ¶15). However, the base offense level was then increased to a level 33 because the movant was subject to an enhanced sentence, pursuant to U.S.S.G. § 4B1.4(a), as an armed career criminal. (PSI ¶:21). Three levels were deducted from the base offense level based on movant's timely acceptance of responsibility, resulting in a total adjusted offense level 30. (PSI ¶¶21-24).

Next, the probation officer determined movant had a total of 14 criminal history points, resulting in a criminal history category VI. (PSI ¶¶40-41). The criminal history category remained the same even with the armed career criminal enhancement, pursuant to U.S.S.G. §4B1.4(c)(3). (PSI ¶42). Based on a total offense level 30 and a criminal history category VI, at the low end, movant's total advisory guideline exposure was 168 to 210 months in prison. (PSI ¶86; Cr-DE#55:22). However , statutorily, movant was facing a minimum mandatory term of imprisonment of 180 months in prison. (Cr-DE#55:22).

Defense counsel, having previously filed objections to the PSI's determination that movant qualified for an enhanced sentence as an armed career criminal (Cr-DE#s37-40), renewed the objections at sentencing. (Cr-DE#55:23-40). After considering the statement of all parties, the PSI containing the advisory guidelines, along with the 18 U.S.C. §3553(a) statutory factors, the court sentenced petitioner to the statutory minimum mandatory term of 180 months imprisonment, to be followed by a

term of 3 years supervised release. (Cr-DE#55:39-40; Cr-DE#45).

Movant appealed, challenging the denial of his motion to suppress, as well as, the constitutionality of his enhanced sentence as an armed career criminal. *See United States v. Welch*, 683 F.3d 1304 (11th Cir. 2012); (Cr-DE#69). On June 13, 2012, the Eleventh Circuit *per curiam* affirmed the denial of the suppression motion, along with the enhanced sentence, in a published opinion. *United States v. Welch, supra.* Certiorari review was denied on January 7, 2013. *Welch v. United States*, __U.S. __ 133 S. Ct. 913, 184 L.Ed.2d 702 (2013); (Cr-DE#71).

For purposes of the federal one-year limitations period, the judgment of conviction in the underlying criminal case became final at the latest on **January 7, 2013,** when certiorari review was denied by the United States Supreme Court.[4] Less than one year later, the movant returned to this court filing the instant motion to vacate

4. The Supreme Court has stated that a conviction is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. *Griffith v. Kentucky*, 479 U.S. 314, 321, n.6 (1986); *accord, United States v Kaufman*, 282 F.3d 1336 (11th Cir. 2002). Once a judgment is entered by a United States court of appeals, a petition for writ of certiorari must be filed within 90 days of the date of entry. The 90 day time period runs from the date of entry of the judgment rather than the issuance of a mandate. *Sup.Ct.R.* 13; *see also, Close v. United States*, 336 F.3d 1283 (11th Cir. 2003).

with supporting memorandum, pursuant to 28 U.S.C. §2255, on **December 9, 2013.**[5] (Cv-DE#s1,2).

III. Standard of Review

Pursuant to 28 U.S.C. §2255, a prisoner in federal custody may move the court which imposed sentence to vacate, set aside or correct the sentence if it was imposed in violation of federal constitutional or statutory law, was imposed without proper jurisdiction, is in excess of the maximum authorized by law, or is otherwise subject to collateral attack. 28 U.S.C. §2255. In determining whether to vacate a movant's sentence, a district court must first determine whether a movant's claim is cognizable under Section 2255. *See Lynn v. United States*, 365 F.3d 1225, 1232-33 (11th Cir. 2004) (stating that a determination of whether a claimed error is cognizable in a Section 2255 proceeding is a "threshold inquiry"), *cert. den'd*, 543 U.S. 891, 125 S. Ct. 167, 160 L. Ed. 2d 154 (2004). It is well-established that a Section 2255 motion may not be a

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5. The §2255 and supporting memorandum are neither signed nor dated. Although the exact date it was mailed cannot be determined, the undersigned has utilized the Clerk's receipt date for purposes of the filing date. It is worth noting that due to lack of verification, the motion, as currently filed, is subject to dismissal. *See* Rule 2(b)(5) of the Rules Governing §2255 Proceedings in District Courts. Since movant cannot prevail on any of the claims presented, the undersigned has addressed the merits of the claims in the alternative. By separate order, the undersigned has directed movant to verify the §2255 motion under penalty of perjury. His failure to do so prior to the district court's consideration of this Report and ensuing Order may result in dismissal of this action on that basis, in the alternative.

substitute for a direct appeal. *Id.* at 1232 (*citing United States v. Frady*, 456 U.S. 152, 165, 102 S. Ct. 1584, 1593, 71. L.Ed.2d 816 (1982)).

The Eleventh Circuit promulgated a two-part inquiry that a district court must consider before determining whether a movant's claim is cognizable. First, a district court must find that "a defendant must assert all available claims on direct appeal." *Lynn, supra* (*citing Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1994)). Second, a district court must consider whether the type of relief the movant seeks is appropriate under Section 2255. This is because "[r]elief under 28 U.S.C. §2255 is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice." *Lynn*, 365 F. 3d at 1232-33 (*quoting Richards v. United States*, 837 F.2d 965, 966 (11th Cir. 1988) (internal quotations omitted)).

If a court finds a claim under Section 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255. To obtain this relief on collateral review, a petitioner must "clear a significantly higher hurdle than would exist on direct appeal." *Frady*, 456 U.S. at 166, 102 S.Ct. at 1584 (rejecting the plain error standard as not sufficiently deferential to a final judgment).

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Under Section 2255, unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," the court shall "grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." However, "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Schriro v. Landrigan*, 550 U.S. 465, 474, 127 S. Ct. 1933, 1940, 167 L.Ed.2d 836 (2007). *See also Aron v. United States*, 291 F.3d 708, 715 (11th Cir. 2002) (explaining that no evidentiary hearing is needed when a petitioner's claims are "affirmatively contradicted by the record" or "patently frivolous"). As indicated by the discussion below, the motion and the files and records of the case conclusively show that movant is entitled to no relief, therefore, no evidentiary hearing is warranted.

In addition, the party challenging the sentence has the burden of showing that it is unreasonable in light of the record and the §3553(a) factors. *United States v. Talley*, 431 F.3d 784, 788 (11th Cir. 2005). The Eleventh Circuit recognizes "that there is a range of reasonable sentences from which the district court may choose," and ordinarily expect a sentence within the defendant's advisory guideline range to be reasonable. *Id.*

A. Guilty Plea Principles

It is well settled that before a trial judge can accept a guilty plea, the defendant must be advised of the various constitutional rights that he is waiving by entering such a

plea. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). Since a guilty plea is a waiver of substantial constitutional rights, it must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences surrounding the plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). *See also United States v. Ruiz*, 536 U.S. 622, 629 (2002); *Hill v. Lockhart*, 474 U.S. 52, 56 (1985); *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976). To be voluntary and knowing, (1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of his guilty plea. *United States v. Moriarty*, 429 F.3d 1012, 1019 (11th Cir. 2005); *United States v. Mosley*, 173 F.3d 1318, 1322 (11th Cir. 1999).

After a criminal defendant has pleaded guilty, he may not raise claims relating to the alleged deprivation of constitutional rights occurring prior to the entry of the guilty plea, but may only raise jurisdictional issues, *United States v. Patti*, 337 F.3d 1317, 1320 (11th Cir. 2003), *cert. den'd*, 540 U.S. 1149 (2004), attack the voluntary and knowing character of the guilty plea, *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *Wilson v. United States*, 962 F.2d 996, 997 (11th Cir. 1992), or challenge the constitutional effectiveness of the assistance he received from his attorney in deciding to plead guilty, *United States v. Fairchild*, 803 F.2d 1121, 1123 (11th Cir. 1986). To determine that a guilty plea is knowing and voluntary, a district court must comply with Rule 11 and address its three core concerns: "ensuring that a defendant (1) enters his guilty plea free from coercion, (2) understands

the nature of the charges, and (3) understands the consequences of his plea." *Id.*; *see also, United States v. Frye*, 402 F.3d 1123, 1127 (11th Cir. 2005) (*per curiam*); *United States v. Moriarty*, 429 F.3d 1012 (11th Cir. 2005).[6]

In other words, a voluntary and intelligent plea of guilty made by an accused person must therefore stand unless induced by misrepresentations made to the accused person by the court, prosecutor, or his own counsel. *Brady v. United States*, 397 U.S. 742, 748 (1970). If a guilty plea is induced through threats, misrepresentations, or improper promises, the defendant cannot be said to have been fully apprised of the consequences of the guilty plea and may then challenge the guilty plea under the Due Process Clause. *See Santobello v. New York*, 404 U.S. 257 (1971).

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6. In *Moriarty*, the Eleventh Circuit specifically held as follows:

> [t]o ensure compliance with the third core concern, Rule 11(b)(1) provides a list of rights and other relevant matters about which the court is required to inform the defendant prior to accepting a guilty plea, including: the right to plead not guilty (or persist in such a plea) and to be represented by counsel; the possibility of forfeiture; the court's authority to order restitution and its obligation to apply the Guidelines; and the Government's right, in a prosecution for perjury, to use against the defendant any statement that he gives under oath.

Id.

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B. Ineffective Assistance of Counsel principles

Because the movant suggests in the motion that counsel rendered ineffective assistance, this Court's analysis begins with the familiar rule that the Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel for his defense." U.S. CONST. amend. VI. To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must demonstrate both (1) that counsel's performance was deficient, and (2) a reasonable probability that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *Harrington v. Richter*, _U.S. _., 131 S.Ct. 770, 788 (2011). *See also Premo v. Moore*, _ U.S. _, 131 S.Ct. 733, 739-740 (2011); *Padilla v. Kentucky*, 559 U.S. 356, 367, 130 S.Ct. 1473, 1482, 176 L.Ed.2d 284 (2010). If the movant cannot meet one of *Strickland*'s prongs, the court does not need to address the other prong. *Strickland*, 466 U.S. at 697, 104 S.Ct. 2069 (explaining a court need not address both prongs of *Strickland* if the defendant makes an insufficient showing on one of the prongs). *See also Butcher v. United States*, 368 F.3d1290, 1293 (11th Cir. 2004); *Brown v. United States*, 720 F.3d 1316 (11th Cir. 2013).

To show counsel's performance was unreasonable, a defendant must establish that "no competent counsel would have taken the action that his counsel did take." *Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008) (citations omitted); *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000). With regard to the prejudice requirement, the movant must establish that,

but for counsel's deficient performance, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. For the court to focus merely on "outcome determination," however, is insufficient; "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Lockhart v. Fretwell*, 506 U.S. 364, 369-70, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993); *Allen v. Sec'y, Fla. Dep't of Corr's*, 611 F.3d 740, 754 (11th Cir. 2010). A defendant therefore must establish "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Lockhart*, 506 U.S. at 369 (*quoting Strickland*, 466 U.S. at 687).

In the context of a guilty plea, the first prong of *Strickland* requires petitioner to show his/her plea was not voluntary because he/she received advice from counsel that was not within the range of competence demanded of attorneys in criminal cases, while the second prong requires petitioner to show a reasonable probability that, but for counsel's errors, he/she would have entered a different plea. *Hill*, 474 U.S. at 56-59. If the petitioner cannot meet one of *Strickland's* prongs, the court does not need to address the other prong. *Dingle v. Sec'y for Dep't of Corr's*, 480 F.3d 1092, 1100 (11th Cir.), *cert. den'd*, 552 U.S. 990 (2007); *Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir.), *reh'g and reh'g en banc den'd by, Holladay v. Haley*, 232 F.3d 217 (11th Cir.), *cert. den'd*, 531 U.S. 1017 (2000).

However, a defendant's sworn answers during a plea colloquy must mean something. Consequently, a defendant's sworn representations, as well as representation of his/her lawyer and the prosecutor, and any findings by the judge in accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings." *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977); *United States v. Medlock*, 12 F.3d 185, 187 (11th Cir.), *cert. den'd*, 513 U.S. 864 (1994); *United States v. Niles*, __ F.3d __, 2014 WL 1876276 (11th Cir. May 12, 2014) (unpublished.).[7]

A criminal defendant is bound by his/her sworn assertions and cannot rely on representations of counsel which are contrary to the advice given by the judge. *See Scheele v. State*, 953 So.2d 782, 785 (Fla. 4 DCA 2007) ("A plea conference is not a meaningless charade to be manipulated willy-nilly after the fact; it is a formal ceremony, under oath, memorializing a crossroads in the case. What is said and done at a plea conference carries consequences."); *Iacono v. State*, 930 So. 2d 829 (Fla. 4 DCA 2006) (holding that defendant is bound by his sworn answers during the plea colloquy and may not later assert that he committed perjury during the colloquy because his attorney told him to lie); *United States v. Rogers*, 848 F.2d 166, 168 (11th Cir. 1988) ("[W]hen a defendant makes statements under oath at a plea colloquy, he bears a heavy burden to show his statements were false.").

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7. "Unpublished opinion are not considered binding precedent, but they may be cited as persuasive authority." 11th Cir. R. 36-2. The Court notes this same rule applies to other Fed. Appx. cases cited herein.

Moreover, in the case of alleged sentencing errors, the movant must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been less harsh due to a reduction in the defendant's offense level. *Glover v. United States*, 531 U.S. 198, 203-04, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001). A significant increase in sentence is not required to establish prejudice, as "any amount of actual jail time has Sixth Amendment significance." *Id.* at 203.

Furthermore a §2255 movant must provide factual support for his contentions regarding counsel's performance. *Smith v. White*, 815 F.2d 1401, 1406-07 (11th Cir. 1987). Bare, conclusory allegations of ineffective assistance are insufficient to satisfy the *Strickland* test. *See Boyd v. Comm'r, Ala. Dep't of Corr's*, 697 F.3d 1320, 1333-34 (11th Cir. 2012); *Garcia v. United States*, 456 Fed. Appx. 804, 807 (11th Cir. 2012) (*citing Yeck v. Goodwin*, 985 F.2d 538, 542 (11th Cir. 1993); *Wilson v. United States*, 962 F.2d 996, 998 (11th Cir. 1992); *Tejada v. Dugger*, 941 F. 2d 1551, 1559 (11th Cir. 1991), *cert. den'd, Tejada v. Singletary*, 502 U.S. 1105 (1992); *Stano v. Dugger*, 901 F.2d 898, 899 (11th Cir. 1990) (*citing Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)); *United States v. Ross*, 147 Fed.Appx. 936, 939 (11th Cir. 2005).

Finally, the Eleventh Circuit has recognized that given the principles and presumptions set forth above, "the cases in which habeas petitioners can properly prevail ... are few and far between." *Chandler*, 218 F.3d at 1313. This is because the test is not what the best lawyers would have done or even what most good lawyers would

have done, but rather whether some reasonable lawyer could have acted in the circumstances as defense counsel acted. *Dingle*, 480 F.3d at 1099; *Williamson v. Moore*, 221 F.3d 1177, 1180 (11th Cir. 2000). "Even if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was 'so patently unreasonable that no competent attorney would have chosen it.'" *Dingle*, 480 F.3d at 1099 (*quoting Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983)). The Sixth Circuit has framed the question as not whether counsel was inadequate, but rather counsel's performance was so manifestly ineffective that "defeat was snatched from the hands of probable victory." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992).

IV. Threshold Issues

The government concedes that this federal proceeding was instituted less than a year after movant's conviction became final. (Cv-DE#9). As will be recalled, movant's conviction became final at the latest on **January 7, 2013,** when certiorari review was finally denied by the United States Supreme Court. For purposes of the AEDPA' s one-year federal limitations period, the movant was required to file this motion to vacate within one year from the time the judgment became final, or no later than **January 7, 2014.** *See Griffith v. Kentucky*, 479 U.S. 314, 321, n.6 (1986); *see also, See Downs v. McNeil*, 520 F.3d 1311, 1318 (11th Cir. 2008) (*citing Ferreira v. Sec'y, Dep't of Corr's*, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007) (this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the

limitations period expires on the anniversary of the date it began to run); *accord United States v. Hurst*, 322 F.3d 1256, 1260-61 (10th Cir. 2003); *United States v. Marcello*, 212 F.3d 1005, 1008-09 (7th Cir. 2000)). Pursuant to the mailbox rule, movant's motion was filed on **December 9, 2013,** less than a year after his conviction became final. Therefore the government's argument is correct and this federal petition is not time-barred.

V. Discussion

In this federal habeas petition, movant argues that his guilty plea was not knowing and voluntary because his lawyer failed to inform him that he would be subject to an enhanced sentence as an armed career criminal. (Cv-DE#1; Cv-DE#2:2). He claims that but for counsel's deficiency, he would not have accepted the 15-year plea and would have proceeded to trial. (Cv-DE#2:Memo:2). Petitioner concedes he was told at the second change of plea proceeding that he was "potentially being considered as an armed career offender," but maintains he was not told that he did, in fact, qualify for such an enhancement. (*Id.*). He maintains he told counsel he did not want to go through with accepting the second plea offer, but counsel coerced and/or otherwise verbally forced him into doing so. (*Id.* :3). According to petitioner, knowledge of his status as an armed career criminal did not come to the government and defense counsel's attention until after he accepted the first plea and was debriefed by the government. (*Id.*). He claims that, had he known the government would utilize his debriefing to enhance his sentence, he would never have negotiated a plea. (*Id.*). Lastly, movant suggests

that the prior convictions used to support his enhanced sentence violate the Supreme Court's decisions in *Begay* and *Descamps*. (*Id.* :4). Finally, movant suggests that had he proceeded to trial, he only faced a- total guideline sentencing range of 51 to 63 months in prison. (*Id.* :6) Of course, his calculations are mistakenly premised on a sentencing range without the armed career criminal enhancement. (*Id.*).

A. Voluntariness of Plea

As previously narrated, movant pleaded guilty to being a felon in possession of a firearm and ammunition. His claims challenging counsel effectiveness leading up to and resulting in the Rule 11 change of plea proceeding are clearly refuted by the record, and/or otherwise waived due to the entry of a knowing and voluntary plea.

The law is clear that a movant waives or more accurately, forfeits his right to contest all non-jurisdictional defects and defenses, when he enters a knowing and voluntary guilty plea. S*ee United States v. Broce*, 488 U.S. 563 (1989); *McMann v. Richardson*, 397 U.S. 759 (1970) (voluntary guilty plea waives all non-jurisdictional defects); *United States v. De La Garza*, 516 F.3d 1266, 1271 (11th Cir. 2008), *quoting, Wilson v. United States*, 962 F.2d 996 (11th Cir. 1992) (claim of ineffective assistance of counsel relating to pre-plea issues waived by voluntary guilty plea); *McCoy v. Wainwright*, 804 F.2d 1196, 1198 (11th Cir. 1986) (voluntary guilty plea waives all non-jurisdictional defects); *see also, United States v. Glinsey*, 209 F.3d 386, 392 (5th Cir. 2000), *citing, United States v. Smallwood*,

920 F.2d 1231, 1240 (5th Cir. 1991); *Smith v. United States*, 447 F.2d 487, 488 (5th Cir. 1971), *citing, Hayes v. Smith*, 447 F.2d 488 (5th Cir. 1971). "This includes claims of ineffective assistance of counsel except insofar as the ineffectiveness is alleged to have rendered the guilty plea involuntary." *United States v. Glinsey*, 209 F.3d at 392.

In this case, review of the record confirms that the movant's plea was knowing and voluntary, and therefore, the movant has waived any defenses be may have had prior thereto to the charged conduct. *See United States v. Moriarty*, 429 F.3d 1012, 1019 (2005). The transcript of the change of plea proceedings confirms that the court conducted a thorough Rule 11 proceeding. In pertinent part, the movant acknowledged under oath that he was satisfied with counsel's representation, that he discussed the charges and the evidence with counsel, as well as, possible defenses prior to the change of plea. Movant also acknowledged the rights he was waiving by entering into the plea, and further denied being forced, or otherwise coerced by counsel or anyone into changing his plea.

It is also evident that the movant understood the facts and the elements of the offense upon which the charge rested. Moreover, by way of entering into the negotiated plea agreement, the movant was telling his lawyer not to conduct any further investigation and not present at a pre-trial or trial proceeding any legal defenses, that he may be entitled to as it related to his case. More importantly to the issue of his enhanced sentence, movant acknowledged he was facing a 15-year minimum and up to a term of life imprisonment based on the offense of conviction. Under

these circumstances, no showing has been made that the plea was anything but knowing and voluntary. It further bears mentioning that movant's suggestion that he was forced and/or otherwise coerced by counsel to change his plea is clearly refuted by the record.

Thus, where movant swore under penalty of perjury at the change of plea proceeding that no one had threatened, coerced, or forced him into entering a guilty plea, there is a strong presumption that his representations are true. *United States v. Medlock*, 12 F.3d 185, 187 (11th Cir. 1994); *see also United States v. Rogers*, 848 F.2d 166, 168 (11th Cir. 1988) ("[W]hen a defendant makes statements under oath at a plea colloquy, he bears a heavy burden to show his statements were false.").

As a result, even if counsel the defense and the government were unaware early on, when the first Rule 11 proceeding was conducted, that movant was facing an enhanced sentence as an armed career criminal, certainly by the time the knowing and voluntary second plea proceeding was concluded, movant was aware he was facing such a sentence exposure. He further acknowledged exploring the issue with counsel. In fact, contrary to the movant's arguments here, counsel did in fact argue against the enhanced sentence. Specifically, defense counsel argued that the prior state court convictions did not qualify as prior crimes of violence for purposes of the armed career criminal enhancement. Therefore, they could not be utilized as predicate offenses. Under these circumstances, movant has not demonstrated that [any that] further argument, as suggested movant here,

would have resulted in a lesser sentence. In other words, a sentence without the enhancement. As a result, he cannot satisfy the prejudice prong under *Strickland* and is thus entitled to no relief on this claim. *See United States v. Ross*, 143 Fed.Appx. 936 (11th Cir. 2005) ("the district court was within its authority to discredit any allegations that Ross's counsel was ineffective which were contrary to the statements he made under oath at the plea hearing").

Moreover, movant has not overcome the presumption that his statements under oath at the Rule 11 proceeding were true and correct. *See generally United States v. Clayton*, 447 Fed.Appx. 65 (11th Cir. 2011) (defendant received close assistance of counsel where, during plea colloquy, defendant "confirmed that he had discussed the charges, plea agreement, and guidelines with his lawyer, had been given adequate time to consult with his lawyer, and was satisfied with his lawyer's representation," and had not "overcome the strong presumption that statements made during the plea colloquy are true"); *United States v. Price*, 139 Fed.Appx. 253 (11th Cir. 2005) (no abuse of discretion in denying motion to withdraw guilty plea where plea hearing transcript "makes clear that the district court went through Price's rights with him, that price understood those rights, that Price was satisfied with his counsel, and that—despite any factual disputes—Price persisted in pleading guilty" and where hearing transcript included defendant's confirmation "that he had consulted his counsel about how to proceed and that he had been 'extremely' satisfied with his counsel's representation").

To the extent movant means to argue that his plea was not knowing and voluntary because it was premised on counsel's misadvice regarding his sentence exposure, that claim also warrants no relief. Even if this Court were to accept as true movant's allegations that before he entered the second plea, defense counsel somehow led him to believe he would not face an enhanced sentence as an armed career criminal, it cannot be said that such representation was either coercive or that it unduly influenced movant's decision. First, an erroneous estimation of the guidelines does not entitle movant to relief in that "[a]n erroneous estimate by counsel as to the length of sentence" is not "necessarily indicative of ineffective assistance." *Beckham v. Wainwright*, 639 F.2d 262, 265 (5th Cir. 1981).[8] Even when an attorney erroneously estimates his client's potential sentence, the movant must satisfy the prejudice requirement of *Strickland* by showing that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59, 106 S.Ct. at 370; *United States v. Stumpf*, 827 F. 2d 1027, 1030 (5th Cir. 1987); *see also, United States v. Pease*, 240 F.3d 938, 940-42 (11th Cir. 2001) (rejecting argument by defendant sentenced as a career offender that her plea was not knowing and voluntary because he had relied on counsel's prediction that her potential sentence under the plea agreement would be anywhere from five to ten years); *Carranza v. United States*, 508 Fed.Appx. 873 (11th Cir. 2013); *United*

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8. The Eleventh Circuit has adopted as binding precedent all decisions of the former Fifth Circuit rendered before October 1, 1981, and all Fifth Circuit Unit B decisions rendered after October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

States v. Arvanitis, 902 F.2d 489, 494-95 (7th Cir. 1990) (no ineffective assistance where claim based only on inaccurate prediction of sentence).

The movant acknowledged during the second Rule 11 proceeding that, pursuant to the applicable statute, he was facing a 15-year minimum mandatory as an armed career criminal, and up to a maximum of life in prison. He also acknowledged that the court would consider the advisory guideline range, and that movant would be unable to withdraw his plea as a result of the sentence imposed. Movant indicated that he understood the possible sentence he could receive, denied being promised anything, other than as set forth in the newly modified written plea agreement, to induce him to change his plea, and denied being threatened or otherwise forced to plead guilty. The law is clear that a defendant's sworn representations, along with the representations of his lawyer and the prosecutor, and any findings by the judge in accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings." *Blackledge*, 431 U.S. at 73-74. *See also United States v. Lemaster*, 403 F.3d 216, 221-222 (4th Cir. 2005) ("[I]n the absence of extraordinary circumstances, the truth of sworn statements made during a Rule 11 colloquy is conclusively established, and a district court should, without holding an evidentiary hearing, dismiss any §2255 motion that necessarily relies on allegations that contradict the sworn statements.").

It bears noting that "[A]s a matter of public policy, no court should tolerate a claim of this kind, wherein the movant literally suggests in his §2255 filings that

he lied during the Rule 11 hearing," "[N]or should such a movant find succor in claiming" as movant does here, that "my lawyer told me to lie" or otherwise threatened/coerced him into doing so. *See Gaddis v. United States*, 2009 WL 1269234, *5 (S.D.Ga.2009) (unpublished). In his form §2255, in accordance with 28 U.S.C. §1746(1), movant declared "under penalty of perjury," that the claim(s) were true and correct. (Cv-DE#2:14). As noted previously in this Report, movant is now claiming in this proceeding that she was coerced to testify as she did during her change of plea proceeding before the district court. So, he was lying under oath at that time, or is lying under oath now. "[S]uch casual lying enables double-waivered, guilty-plea convicts to feel far too comfortable filing otherwise doomed §2255 motions that consume public resources." *See Irick v. United States*, 2009 WL 2992562 at *2 (S.D. Ga. Sept. 17, 2009). However, the Undersigned takes no position on whether the government should "consider investigating the movant for perjury." *See Irick v. United States, supra*; *see also*, *Rivera v. Allin*, 144 F.3d 719, 731 (11th Cir. 1998) (district court did not abuse its discretion by dismissing an action without prejudice where plaintiff "had lied under penalty of perjury about the existence of a prior lawsuit"), *abrogated on other grounds by Jones v. Bock*, 549 U.S. 199, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007).

Here, movant has not shown a reasonable probability that he was coerced, forced, or otherwise unlawfully induced to enter his plea. To the contrary his allegations are directly refuted by the Rule 11 representations made by him under oath. Thus, he cannot now contend that his guilty plea was in reliance upon some alternative

characterization of his sentence exposure or advice given to him by his counsel. His self-serving statements that he was misadvised by counsel regarding his sentence exposure is wholly conclusory with no support whatever in the record, not to mention incredible.[9]

Further, even if we assume, without deciding, that before the plea proceeding it was in some way conveyed to movant that he was to receive a particular lesser sentence as he suggests here, movant's reliance on his attorney's erroneous prediction of a more lenient sentence is not sufficient to render a guilty plea involuntary. *See Stumpf*, 827 at 1030. *See also United States v. Harmon*, 139 F.3d 899 (5th Cir. 1998) (finding that the defendant could not "claim that his guilty plea was involuntary based upon his attorney's erroneous prediction about the length of the sentence"). As the Fifth Circuit explained in *Daniel v. Cockrell*, 283 F.3d 697 (5th Cir. 2002):

> A guilty plea is not rendered involuntary by the defendant's mere subjective understanding that he would receive a lesser sentence. In other words, if the defendant's expectation of a lesser sentence did not result from a promise or

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9. *See generally United States v. Jones*, 614 F.2d 80, 81-82 (5th Cir. 1980) (district court justified in dismissing section 2255 movant's claims when movant presented only conclusory allegations to support claims). *See also Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) (recognizing that a petitioner is not entitled to habeas relief "when his claims are merely 'conclusory allegations unsupported by specifics' or 'contentions that in the face of the record are wholly incredible'" (citation omitted)).

> guarantee by the court, the prosecutor or defense counsel, the guilty plea stands. Likewise, a guilty plea is not rendered involuntary because the defendant's misunderstanding was based on defense counsel's inaccurate prediction that a lesser sentence would be imposed.

Daniel, 283 F.3d at 703.

It also cannot be overlooked that the entry of the guilty plea was clearly in the best interest of the movant. Because of the plea negotiated by defense counsel, movant benefitted from a three level reduction to his base offense level for acceptance of responsibility. Had he proceeded to trial and been found guilty, movant's exposure upon conviction may have been significantly greater. He also may not have been eligible for a reduction in his guideline range based on acceptance of responsibility. On the record before this court, movant has not demonstrated here that but for counsel's errors, he would not have pled guilty but would have gone to trial. *Hill*, 474 U.S. at 56-59. His suggestion at this juncture is wholly incredible and therefore rejected.

In conclusion, the record reveals that movant is not entitled to relief on any of the arguments presented as it is apparent from the extensive review of the record above that movant's guilty plea was entered freely, voluntarily and knowingly with the advice received from competent counsel and not involuntarily and/or unknowingly entered, as now claimed by him. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Brady v. United States*, 397 U.S. 742, 748

(1970).[10] See *also Hill v. Lockhart, supra; Strickland v. Washington, supra.* 466 U.S. 668 (1984). Further, as noted above, his enhanced sentence as a career criminal was proper. Therefore, no showing has been made that any further argument in this regard during the penalty phase of his case would have resulted in a different outcome, *i.e.*, a lower sentence.

Moreover, it bears noting that movant challenged the lawfulness of his enhanced sentence as an armed career criminal on appeal. *See United States v. Welch, supra*; (Cr-DE#69). The Eleventh Circuit affirmed the district court's finding, ruling in part pertinent that movant's prior robbery conviction qualified as a predicate offense for purposes of the enhancement. (*Id.*).

Consequently, the challenge of his sentence in this collateral proceeding, albeit expanding on the argument that his status as an armed criminal career criminal is unlawful, presented in the guise of an ineffective assistance of counsel, adds nothing of substance to

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10. It is well settled that before a trial judge can accept a guilty plea, the defendant must be advised of the various constitutional rights that he is waiving by entering such a plea. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). Since a guilty plea is a waiver of substantial constitutional rights, it must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences surrounding the plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). A voluntary and intelligent plea of guilty made by an accused person who has been advised by competent counsel may not be collaterally attacked. *Mabry v. Johnson*, 467 U.S. 504, 508 (1984).

warrant reconsideration of the issue here. *See United States v. Nyhuis*, 211 F.3d 1340, 1343 (11th Cir. 2000) ("Once a matter has been decided adversely to a defendant on direct appeal it cannot be re-litigated in a collateral attack under section 2255." (internal marks, citation and footnote omitted); *Mills v. United States*, 36 F.3d 1052, 1056 (11th Cir. 1994) (*per curiam*)("[P]rior disposition of a ground of error on direct appeal, in most cases, precludes further review in a subsequent collateral proceeding.") *United States v. Rowan*, 663 F.2d 1034, 1035 (11th Cir. 1981) (*per curiam*) ("This Court is not required on § 2255 motions to reconsider claims of error raised and disposed of on direct appeal."). Couching his claim in the guise of an ineffective-assistance-of-counsel claim in this §2255 proceeding adds nothing of substance which would justify a different result. *See Nyhuis*, 211 F.3d at 1343 (defendant was not entitled to collateral relief based on due process claim that was mere re-characterization of double jeopardy and immunity claim that was rejected on direct appeal) (citation omitted).

Stated differently, a claim rejected on direct appeal does not merit rehearing on a different legal theory. *Nyhuis*, 211 F.3d at 1343, *citing*, *Cook v. Lockhart*, 878 F.2d 220, 222 (8th Cir. 1989). Also, movant has failed to establish prejudice pursuant to *Strickland* arising from counsel's failure to pursue this argument at sentencing and/or on appeal. He is thus entitled to no relief on this claim.

Appendix F

B. Challenge to Armed Career Criminal Sentence

Alternatively, it appears movant argues a free standing claim that he is entitled to *vacatur* of his conviction and sentence based on the Supreme Court's recent decisions In *Alleyne v. United States*, 133 S.Ct. 2151 (2013) and *Descamps v. United States*,[11] __ U.S. __, 133 S.Ct. 2276 (2013) on the basis that the district court, and not the jury, made factual determinations regarding movant's enhanced sentence. He suggests counsel should have anticipated these arguments. (Cv-DE#2; Cv-DE#7).

These decisions are the latest edition to the progeny of the Supreme Court's decision in *Apprendi v. New Jersey*,

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11. In *Descamps*, the defendant was convicted of possession of a firearm by a convicted felon and sentenced under the Armed Career Criminal Act ("ACCA"), based in part on his prior burglary conviction under California law. *Descamps* involved application of the "residual clause" of the ACCA, §924(e)(2)(B)(ii), which defines "violent felony" as "burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. §924(e)(2)(B)(ii). The California burglary statute did not include an element of the generic crime of burglary; it did not require that a burglar "enter or remain unlawfully in a building." The Supreme Court held that federal sentencing courts may not apply the "modified categorical approach" (meaning, consulting a limited class of documents, such indictments and jury instructions) to sentencing under ACCA's "residual clause" when the state crime of which the defendant was convicted has a single, indivisible set of elements (meaning, the statute did not contain alternative elements) *Descamps*, __ U.S. ___, 133 S.Ct. at 2281-82.

520 U.S. 466 (2010),[12] in which the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 520 U.S. at 490. Movant alleges that his guideline range was determined and drove his ultimate sentence upward based on facts which were neither charged in the indictment nor proved beyond a reasonable doubt by the jury at trial. Therefore, his sentence enhancement violated *Alleyne* and *Descamps*.

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12. The Eleventh Circuit has held that cases such as, *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) are not retroactively applicable on collateral review. *See e.g., Varela v. United States*, 400 F.3d 864, 867-68 (11th Cir. 2005), *cert. den'd*, 529 U.S. 1122, 120 S.Ct. 1992, 146 L.Ed.2d 817 (2005). The Eleventh Circuit has found that the decision in *Alleyne* is based on *Apprendi*, therefore, a defendant whose conviction became final long before *Apprendi* and *Alleyne* were decided, cannot now collaterally challenge his conviction based on his jury's failure to find drug quantity, because the holding in *Apprendi* does not apply retroactively. *Starks v. Warden, FCC Coleman-USP I*, 552 Fed.Appx. 869 (11th Cir. 2013) (unpublished). Other courts have similarly held that since *Apprendi* and its progeny have not been found retroactively applicable, thereby implying that the Supreme Court will not declare *Alleyne* to be retroactively applicable. *See Simpson v. United States*, 721 F.3d 875 (7th Cir. 2013); *Scott v. United States*, 2013 WL 4077546, *1 (S.D.Ga. 2013); *Ward v. United States*, 2013 WL 4079267, *2 (W.D.N.C. 2013). Unless the Supreme Court decides some time in the future that *Alleyne* applies retroactively on collateral review, movant cannot now collaterally challenge his convictions and sentences pursuant to *Alleyne*.

Appendix F

The Eleventh Circuit has determined that *Alleyne*, an extension of *Apprendi*, is not retroactively applicable to cases on collateral review. *See Jeanty, Jr. v. Warden, FCI-Miami*, __ F.3d __, 2014 WL 3411144 (11th Cir. July 15, 2014) (published) (*citing United States v. Harris*, 741 F.3d 1245, 1250 n.3 (11th Cir. 2014)); *see also, Starks v. FCC Coleman USP I*, __ F.3d __, 2013 WL 6670797 (11th Cir. 2013) (unpublished); *see also, Chester v. Warden*, __ Fed. Appx. __, 2014 WL 104150 (11th Cir. 2014) (unpublished) (*citing, Dohrmann v. United States*, 442 F.3d 1279, 1281-82 (11th Cir. 2006); *McCoy v. United States*, 266 F.3d 1245, 1256-58 (11th Cir. 2001) (holding that *Apprendi* is not retroactively applicable to cases on collateral review)).

Further, other courts who have considered the issue have also held that *Alleyne* has not been made retroactively applicable to cases on collateral review. *See In re Payne*, No. 13-5103, 2013 WL 5200425, at *1-*2. (10th Cir. Sept. 17, 2013) (agreeing with the Seventh Circuit that *Alleyne* is an extension of *Apprendi* and does not apply retroactively); *Simpson v. United States*, 721 F.3d 875, 876 (7th Cir. 2013) (holding that *Alleyne*, like *Apprendi*, was not made retroactive); *Frank v. United States*, Nos. CV 113-113, CR 103-045, 2013 WL 4679826, at *3 n. 1(S.D.Ga. Aug. 30, 2013) ("The Court is not aware of any authority indicating that *Alleyne* is retroactively applicable, and the case itself provides no such indication."); *Ward v. United States*, No. 1:02-cr-00063-MR-1, 2013 WL 4079267, at *2 (W.D.N.C. Aug. 13, 2013) (finding that petitioner's motion was untimely and §2255(f)(3) did not apply because the Supreme Court has not found that *Alleyne* is retroactive to cases on collateral review); *Luney v. Quintana*, No.

6:13-003-DCR, 2013 WL 3779172, at *3 (E.D.Ky. July 18, 2013) (noting that "there is no indication in ... *Alleyne*, that the Supreme Court made [that] holding retroactive to cases on collateral review.").

Like *Alleyne*, *Descamps*, an extension of *Apprendi* is also not retroactively applicable to cases on collateral review. The Supreme Court has also not declared *Descamps* to be retroactive to cases on collateral review. *Wilson v. Warden*, FCC Coleman, 2014 WL 4345685, *3 (11th Cir. Sept. 3, 2014); *Groves v. United States*, 755 F.3d 588, 593 (7th Cir. 2014); *Baker v. Chapa*, 2014 WL 4100712, *1 (5th Cir. Aug. 21, 2014). Nor has the Sixth Circuit so found. *Shelton v. United States*, 2014 WL 460868, *3 (E.D.Tenn. Feb. 5, 2014). Moreover, *Descamps* was decided in the context of a direct appeal, and the Supreme Court has not since applied it to a case on collateral review. *Cf. In re Anderson*, 396 F.3d 1336, 1339 (11th Cir. 2005) (holding that *United States v. Booker*, 543 U.S. 220 (2005), was not retroactively applicable, in part, because the Supreme Court had decided it on direct appeal, and had not applied it to a case on collateral review).

Nevertheless, it bears noting that even if counsel was deficient for failing to request a downward departure at sentencing for the reasons set forth by the movant in this collateral proceeding, no showing has been made that the court would have granted a further variance, and imposed a lesser sentence. Movant has not met his burden of demonstrating that such an argument would have succeeded, much less that his sentence was unreasonable in light of the record before this court.

Appendix F

To the extent movant also argues that the court erred by enhancing his sentence as an ACCA based on facts not charged in the Indictment, found by a jury, nor admitted by him, that claim warrants no relief. In fact, the Eleventh Circuit has previously determined that "district courts may determine both the existence of prior convictions and the factual nature of those convictions, including whether they were committed on different occasions, so long as they limit themselves to *Shepard*-approved documents." *United States v. Weeks*, 711 F.3d 1255, 1259 (11th Cir. 2013). Here, the court properly found movant qualified for an enhanced sentence as an armed career criminal. The enhanced penalty provision need not have been charged in the indictment nor proven beyond a reasonable doubt. *United States v. Weeks, supra.* Thus, no deficient performance or prejudice under *Strickland* has been established arising from counsel's failure to pursue this issue.

Moreover, both the Supreme Court and the Eleventh Circuit have held that "[A] sentence must be both procedurally and substantively reasonable. *See Gall v. United States*, 552 U.S. 38, 51 (2007) ("Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence...."); *United States v. Ellisor*, 522 F.3d 1255, 1273 (11th Cir. 2008). A sentence will only be reversed as substantively unreasonable upon a "definite and firm conviction that the district court committed a clear error of judgment in weighing the §3553(a) factors." *United States v. McGarity*, 669 F.3d 1218, 1264 (11th Cir.) (internal quotation marks omitted),

cert. den'd, McGarity v. United States, __ U.S. __, 133 S.Ct. 378, 184 L.Ed.2d 220 (2012). The party challenging the sentence bears the burden of proof. *Id.*

The record confirms that the court not only considered defense counsel's arguments against the enhanced sentence, but also considered the advisory guidelines, along with the §3553 statutory factors. The movant was sentenced to the statutory minimum mandatory term of 15 years in prison. It is evident from the record that the district court properly applied 18 U.S.C. §3553 to the facts of this case and imposed a substantively reasonable sentence. Moreover, the fact that movant's sentence is far below the maximum term of life imprisonment, is also a strong indication of substantive reasonableness. *See United States v. Gonzalez*, 550 F.3d 1319, 1324 (11th Cir. 2008) (holding that a sentence was substantively reasonable, in part because it was "well below the maximum ten-year sentence"). Movant has not demonstrated that counsel was deficient, much less that he was prejudiced under *Strickland* based on counsel's failure to pursue this nonmeritorious issue. *Strickland v. Washington, supra.*

In conclusion, the record reveals that movant is not entitled to relief on any of the claims presented in this motion to vacate proceeding as it is apparent from the extensive review of the record that the claims warrant no relief, and more particularly, that movant's guilty plea was entered freely, voluntarily and knowingly with the advice received from competent counsel and not involuntarily and/or unknowingly entered, as now claimed by him. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Brady v.*

United States, 397 U.S. 742, 748 (1970).[13] *See also Hill v. Lockhart, supra; Strickland v. Washington, supra.* 466 U.S. 668 (1984).

VI. Evidentiary Hearing

To the extent movant requests an evidentiary hearing on his claim, it should be denied. The movant has the burden of establishing the need for an evidentiary hearing, and he would only be entitled to a hearing if his allegations, if proved, would establish his right to collateral relief. *See Higgs v. United States*, 711 F.Supp.2d 479, 552 (D.Md. 2010) (*citing Townsend v. Sain*, 372 U.S. 293, 312, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), *overruled on other grounds by* 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992)). Further, a hearing is not required on patently frivolous claims or those which are based upon unsupported generalizations or affirmatively contradicted by the record. *See Holmes v. United States*, 876 F.2d 1545, 1553 (11th Cir. 1989), *citing, Guerra v. United States*, 588 F.2d 519, 520-21 (5th Cir. 1979). As discussed in this Report, the arguments

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13. It is well settled that before a trial judge can accept a guilty plea, the defendant must be advised of the various constitutional rights that he is waiving by entering such a plea. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). Since a guilty plea is a waiver of substantial constitutional rights, it must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences surrounding the plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). A voluntary and intelligent plea of guilty made by an accused person who has been advised by competent counsel may not be collaterally attacked. *Mabry v. Johnson*, 467 U.S. 504, 508 (1984).

raised are unsupported by the record or without merit. No evidentiary hearing is required.

VII. Certificate of Appealability

As amended effective December 1, 2009, §2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." See Rule 11(a), Rules Governing Section 2255 Proceedings for the United States District Courts. A §2255 movant "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §2253(c)." *See* Fed.R.App.P. 22(b)(1). Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. *See* 28 U.S.C. §2255 Rule 11(b).

However, "[A] certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. §2253 (c) (2). To make a substantial showing of the denial of a constitutional right, a §2255 movant must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003) (citations and quotation marks omitted); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir. 2001).

Appendix F

After review of the record in this case, the Court finds the movant has not demonstrated that he has been denied a constitutional right or that the issue is reasonably debatable. *See Slack*, 529 U.S. at 485; *Edwards v. United States*, 114 F.3d 1083, 1084 (11th Cir. 1997). Consequently, issuance of a certificate of appealability is not warranted and should be denied in this case. Notwithstanding, if movant does not agree, he may bring this argument to the attention of the district judge in objections.

VIII. Conclusion

It is therefore recommended that this motion to vacate be denied on the merits, that any pending motions not otherwise ruled upon be denied as moot, that a certificate of appealability be denied; and, the case closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

Signed this 29th day of September, 2014.

/s/
UNITED STATES MAGISTRATE JUDGE

APPENDIX G — REPLY IN SUPPORT OF 2255 PETITION, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, FILED APRIL 10, 2014

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 13-62770-CIC-MARRA
(09-60212-CR-MARRA)

GREGORY WELCH,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S RESPONSE TO THE GOVERNMENT'S RESPONSE

Comes now, petitioner states that he is a layman of the Law, unskilled in the Law, and therefore request that this response be construed liberally. *Haines v. Kerner*, 404 U.S. 519 (1972).

PETITIONER STATES THE FOLLOWING IN THIS RESPONSE:

(1). Petitioner was charged with a Title 18 U.S.C. Section 922(g)(1), not a Title 18 U.S.C. Section 924(e).

Therefore, the state priors used to enhance the petitioner were improperly used because petitioner was never given a fair opportunity to defend himself against the Florida State priors of Docket Numbers 1996-CF-005680 (Robbery Conviction); Docket 1996-CF-001575 (Robbery Conviction); and Docket 2003-CF-17694 (Battery). It was never determined whether these Florida state priors violated *Shepard v. United States*, 544 U.S. 13, 26 (2005); *Taylor v. United States*, 495 U.S. 575 (1990); or *Descamps v. United States*, 133 S.Ct. 2276 (2013), non-generic indivisible elements concerning all three Florida state priors that in fact, violate *Shepard*, *Taylor*, *Descamps*, and *Johnson v. United States*, 130 S.Ct. 1265 (2010); and *Begay v. United States*, 128 S.Ct. 1581 (2008). Plus petitioner pled guilty to lesser offenses in all three state priors, then he was enhanced for. In other words Movant was enhanced for the arresting state priors, but not based on the lesser offenses in which he pled guilty to, *Day v. United States*, 465 F.3d 1265 (2206 11th Cir.) The Armed Career Offender status was therefore, inapplicable and inadequate from the very start. Because Movant was enhanced based on Fifth Amendment rights to improper notice of the state priors, petitioner was never given the opportunity to verify under *Descamps*, *Shepard*, and *Taylor*.

Now in regards to the legal state documentation of these state priors, Movant was enhanced based on non-judicial documentation that was not certified from the county from where the state priors originated at. There were no state transcripts, no state plea agreements, no Shepard material as legal verification of these state priors, no modified categorical approach, no indivisible

element requirements in regards to *Descamps*. Movant was enhanced based on what he supposedly did, not to what he pled guilty in the state for, concerning these state of Florida priors. Thereby, violating the petitioner's Fifth Amendment rights to proper *Shepard*, *Taylor*, and *Descamps*, requirements. Petitioner's Sixth Amendment rights were violated to effective assistance of counsel, because petitioner was prejudiced by these improper, and unconstitutional enhancements that caused petitioner 15 years unconstitutionally in a Federal prison, based on counsel's ineffectiveness, and below standard of representation. *Strickland v. Washington*, 466 U.S. 668-687 (1984); *Cronic v. United States*, 466 U.S. 648 (1984); *Missouri v. Frye*, 132 S.Ct. 1399 (2012); *Lafler v. Cooper*, 132 S.Ct. 1376 (2012); *Padilla v. Kentucky*, 130 S.Ct. 1476 (2010); *Schlup v. Delo*, 513 U.S. 298 (1995); *Hill v. Lockhart*, 474 U.S. 48-52 (1985); *Davis v. United States*, 417 U.S. 333-340 (1994). But for counsel's ineffectiveness and below the standard of representation, the proceedings would have been so much different.

Petitioner's Eighth Amendment rights were violated because it was cruel and unusual punishment to sentence the Movant to 15 years, or involuntarily, unintelligently, or unknowingly plead Movant out based on invalid, non-certified state priors that he was not indicted for, and that he was not given an opportunity to prepare a sufficient and adequate defense against. And priors that were in violation of *Taylor*, *Shepard*, and *Descamps*, *supra*, and petitioner's Fifth, Sixth, and Eighth Amendment rights under the United States Constitution. A presentence report is not evidence, and whether Movant objects to it as not being

evidence, or not, the Court still uses and used it against the Movant anyway in violation of *Shepard*, *Taylor*, and *Descamps*, *supra*, requirements.

(2). It was the government that improperly, along with the probation office that finally determined unconstitutionally that Movant should be declared a Armed Career Offender, when it should have been by and through indictment process. In other words the probation office, and the government with the Court's permission, held it's own trial against the Movant based on state priors that were inadequate, insufficient, and improper, because they were in violation of *Shepard*, *Taylor*, and *Descamps*, and the Movant's Fifth, Sixth, and Eighth Amendment rights. The probation office, the government and the Court held it's own trial on it's own terms and declared the Movant a Armed Career Offender in violation of all of the above stated reasons.

(3). Movant was never made aware that he was being declared a Armed Career Offender in his first plea agreement at all, or that he was going to be sentenced as one. When he took his plea on June 18, 2010, but when he was sentenced on September 17, 2010, he was suddenly given a second plea agreement which enhanced him to Armed Career Offender status in violation of all the above already stated reasons. Thereby, making the plea involuntary, unintelligent, and unknowing. Movant was told that he could receive no more than 10 years on the first plea agreement, it was his only reason for pleading guilty period. *Padill*, *Hill v. Lockhart*, *Missouri v. Fry*, *Lafler v. Cooper*, *supras*. Movant's plea is improper, it violates

the Movant's Fifth, Sixth, and Eighth Amendment rights. It's involuntary, unintelligent, and unknowingly! Had Movant known on the day of September 17, 2010, he was going to receive a different plea right before sentencing, he would have proceeded to trial and proved his innocence in a Court of Law. Counsel should have objected to the second plea agreement, but instead he ineffectively remained silent, allowing the Movant's Fifth, Sixth, and Eighth Amendment rights to be violated to a involuntary, unintelligent, and unknowing plea agreement that violated the Statutes, Laws and Constitution of the United States. Instead of protecting the Movant's constitutional, statutes, and Rule 11, plea rights, counsel allowed them to be waived away by simply remaining silent, and never saying a word to protect his client's rights.

(4). How is the evidence clear of a second plea agreement, when in fact, the Court allowed the government to introduce a second plea agreement on the very day Movant was being sentenced on September 17, 2010. If that's not abuse of discretion, or judicial misconduct, or prosecutor misconduct, or ineffective assistance of counsel in violation of the Movant's Fifth, Sixth, and Eighth Amendment rights, what else could this possibly be. All Movant is requesting is for the Court to allow him to withdraw his involuntary, unintelligent, and unknowing plea, and proceed to trial and prove his innocence in a Court of Law, before a jury of twelve.

The judge stated that Movant was only to receive 10 years at most on a plea transcript by Law, and that Movant could receive no more than ten years at most.

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See plea transcript page 18, Line 5-19 and Page 19, Line 13-25, dated 6/18/2010. Prior to this plea agreement the U.S. Attorney's Office had stipulated that they were going to enhance Movant, but it was all within the contents of the no more than the 10 year plea. However, on the day of sentencing September 17, 2010, the government violated *Santobello v. New York*, 404 U.S. 257 (1974), by introducing a totally new plea agreement for which Movant never had any time nor opportunity to prepare a defense against. Thereby, violating the originally stated plea agreement of June 18, 2010.

Counsel's silence and neglect to speak up for the Movant prejudiced the Movant and caused him 15 years unconstitutionally, in a Federal prison, in violation of *Padilla*, *Lafler*, *Frye*, *Hill v. Lockhart*, *Santobello*, and *Cronic*, *supras*.

(5). Movant's plea was not a voluntary plea, nor a intelligent plea, and definitely not a knowingly plea, based on all of the above stated reasons. Had Movant known he was going to be tricked, schemed, or mislead into a involuntary second plea agreement, he would have proceeded directly to trial. Obviously Movant was mislead, ill-advised, and tricked into a second unwanted involuntary plea on the day of sentencing, based on a agreement in the first plea that counsel and government had already agreed with. Thereby, violating *Santobello v. New York*, in the second involuntary plea, on the day of sentencing. Movant's plea was therefore, as he continues to state, involuntary, unintelligent, and unknowingly.

Appendix G

Movant was verbally forced into a unwanted second plea agreement directly on the day of sentencing by a counsel that would not even speak up for him and or represent him as a counsel guaranteed to him by the Sixth Amendment of the United States Constitution. And as the Honorable Court should be made aware, the government presents a second and new plea agreement to counsel and Movant on the day of sentencing with counsel not speaking up for the Movant and representing the Movant according to a counsel of the Sixth Amendment of the United States Constitution.

(6). Movant has already verified to the Court how the second plea was inaccurate and insufficient, and how Movant could not even prepare a defense against it on the exact day of sentencing. See all of the above stated reasons as to why that a second plea was inaccurate and inadequate, and why counsel was so ineffective, and why that second plea was so gross and defective. And why Movant is screaming loudly ineffective assistance of counsel and involuntary unintelligent, and unknowing plea, and why Movant was incorrectly declared a Armed Career Offender in violation of *Santobello v. New York*; *Hill v. Lockhart*; *Padilla v. Kentucky*, *Missouri v. Frye*, *Lafler v. Cooper*; *Descamps*, *Taylor*, *Shepard*, *Strickland*, and *Cronic*; and *United States v. Al-Arian*, 514 F.3d 1184, 1190 (11th Cir. 2008). Movant was involuntarily forced into the second plea unknowingly on the day of sentencing, by a misleading counsel with verbal coercion. See Movant's original first Section 2255 Motion Memorandum of Law.

(7). The government says that Descamps, is not retroactive. Not only is Descamps, a substantial change in the Law, made retroactive by the Supreme Court, but it also relates back to the Movant's issues and claims concerning non-generic indivisible elements in regards to all three of the Movant's state priors used to improperly and unconstitutionally enhance the Movant to Armed Career Offender status in violation of *Descamps*, *Begay v. United States*, 128 S.Ct. 1581 (2008); *Johnson v. United States*, 130 S.Ct. 1265 (2010). Movant's *Descamps*, claim is retroactively applicable to this Section 2255 Motion. Movant's Descamps claim was newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review. And therefore, should be addressed by this Court. See also, *United States v. Ramirez-Flores*, 2014 WL 667357, * 2 (11th Cir. February 21, 2014) and *United States v. Contreras*, 739 F.3d 592, 594 (11th Cir. 2014) and *Untied States v. Morris*, 516 Fed. Appx. 882 (Apr. 16, 2013), in regards to Eleventh Circuit precedence in *Morris*, in regards to *Descamps*, *supra*.

(8). *Morris*, tells us loud and clear, that a Court other than the Supreme Court may determine retroactively under Section 2255 and 2255(f)(3) and stated that in deciding retroactively we apply the Teague rubric *id.* at 883 (citation omitted). Movant also reaffirms and reasserts his Descamps, claims in his Section 2255 Motion as being a substantial change in the Law, and retroactively applicable to his case.

(9). Movant has proven and verified to the Honorable Court that he is in fact entitled to a Evidentiary Hearing

in this case, based on all of the above stated facts in this response. Movant has set forth those specific facts that support his claims in his Section 2255 Motion, and in this response by the evidence in this response and in his Section 2255 Memorandum of Law. Movant's above stated claims and issues entitle him to a Evidentiary Hearing on his involuntarily, unintelligently, and unknowing plea, and improper and unconstitutional Armed Career Offender status that is in violation of all of the above stated reasons. Movant is therefore, entitled to relief.

CONCLUSION

Movant requests a Evidentiary Hearing, based on all of the above stated facts and reasons. Movant swears under the penalty of perjury that all of the information in this response is true and correct to the best of his knowledge 28 U.S.C. 1746. And counsel refused to submit a affidavit in opposition to the Movant's truthful facts, and honest statements in his Section 2255 Motion and response.

Respectfully Submitted,

/s/_____
Gregory Welch
73675-004
FCC-Coleman-Medium
P.O. Box 1032
Coleman, FL 33521-1032

4/6/14
Dated

APPENDIX H — MOTION TO VACATE SENTENCE PURSUANT TO 28 U.S.C. § 2255, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, FILED DECEMBER 20, 2013

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Docket or Case No.. 09-cr-60212-KAM

Name (under which you were convicted):
GREGORY WELCH

Place of Confinement:
FCC-COLEMAN-MEDIUM

Prisoner No: 73675-004

UNITED STATES OF AMEIRCA

v.

GREGORY WELCH

Movant

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

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U.S. District Court, Southern District of Florida, West Palm Beach Division, West Palm Beach, Florida 33401

(b) Criminal docket or case number (if you know): 09-cr-60212-KAM

2. (a) Date of the judgment of conviction (if you know): 08/17/2010

   (b) Date of sentencing: 8/17/2010

3. Length of sentence: 180 months

4. Nature of crime (all counts): Title 18 U.S.C. Section 922(g)(1)

5. (a) What was your plea? (Check one)

   (1) Not guilty ☐ (2) Guilty ☒
   (3) Nolo contendere (no contest) ☐

   (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? N/A

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☐ Judge only ☒

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☒

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8. Did you appeal from the judgment of conviction?
Yes ☐ No ☒

9. If you did appeal, answer the following : N/A
(a) Name of court: N/A
(b) Docket or case number (if you know): N/A
(c) Result: N/A
(d) Date of result (if you know): N/A
(e) Citation to the case (if you know): N/A
(f) Grounds raised: N/A
(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☒ No ☐
If "yes," answer the following:
(1) Docket or case number (if you know): Unknown
(2) Result: Affirmed
(3) Date of result (if you know): 1/07/2013
(4) Citation to the case (if you know): Unknown
(5) Grounds raised: That Petitioner was not an armed career offender, and was not charged by indictment as being one, based on the state priors that were used against him.

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court? Yes ☐ No ☒

11. If your answer to Question 10 was "Yes," give the following information:
(a)(1) Name of court: N/A
(2) Docket or case number (if you know): N/A

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(3) Date of filing (if you know): N/A
(4) Nature of the proceeding: N/A
(5) Grounds raised: N/A

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?
Yes ☐ No ☒
(7) Result: N/A
(8) Date of result (if you know): N/A

(b) If you filed any second motion, petition, or application, give the same information: N/A
(1) Name of court: N/A
(2) Docket or case number (if you know): N/A
(3) Date of filing (if you know): N/A
(4) Nature of the proceeding: N/A
(5) Grounds raised: N/A
(6) Did you receive a hearing where evidence was given on your motion, petition, or application?
Yes ☐ No ☒
(7) Result: N/A
(8) Date of result (if you know): N/A

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?
(1) First petition: Yes ☐ No ☒
(2) Second petitition: Yes ☐ No ☒

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not: Counsel was ineffective for not doing so.

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12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the *facts* supporting each ground.

GROUND ONE: Counsel was ineffective for allowing the Petitioner to be unconstitutionally sentenced as an armed career offender.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Petitioner was charged with simple possession of a firearm and ammunition. Upon pleading guilty, he was enhanced unconstitutionally to armed career offender status, in violation of his Fifth, Sixth, and Eighth Amendment rights. Thereby, making the plea involuntary.

(b) Direct Appeal of Ground One:
(1) If you appealed from the judgment of conviction, did you raise this issue?
Yes ☐ No ☒
(2) If you did not raise this issue in your direct appeal, explain why: Counsel was ineffective for not doing so.

(c) Post-Conviction Proceedings:
(1) Did you raise this issue in any post-conviction motion, petition, or application?
Yes ☐ No ☒
(2) If your answer to Question (c)(1) is "Yes," state: N/A

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Type of motion or petition: N/A
Name and location of the court where the motion or petition was filed: N/A
Docket or case number (if you know): N/A
Date of the court's decision: N/A
Result (attach a copy of the court's opinion or order, if available): N/A
(3) Did you receive a hearing on your motion, petition, or application?
Yes ☐ No ☒
(4) Did you appeal from the denial of your motion, petition, or application?
Yes ☐ No ☒
(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?
Yes ☐ No ☒
(6) If your answer to Question (c)(4) is "Yes," state: N/A
Name and location of the court where the appeal was filed: N/A
Docket or case number (if you know)? N/A
Date of the court's decision: N/A
Result (attach a copy of the court's opinion or order, if available:) N/A
(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

GROUND TWO: See Attached Memorandum of Law.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): N/A

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(b) Direct Appeal of Ground Two:
(1) If you appealed from the judgment of conviction, did you raise this issue?
Yes ☐ No ☒
(2) If you did not raise this issue in your direct appeal, explain why: N/A

(c) Post-Conviction Proceedings:
(1) Did you raise this issue in any post-conviction motion, petition, or application?
Yes ☐ No ☒
(2) If your answer to Question (c)(1) is "Yes," state: N/A
Type of motion or petition: N/A
Name and location of the court where the motion or petition was filed: N/A
Docket or case number (if your know): N/A
Date of the court's decision: N/A
Result (attach a copy of the court's opinion or order, if available): N/A
(3) Did you receive a hearing on your motion, petition, or application?
Yes ☐ No ☒
(4) Did you appeal from the denial of your motion, petition, or application?
Yes ☐ No ☒
(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?
Yes ☐ No ☒
(6) If your answer to Question (c)(4) is "Yes," state: N/A
Name and location of the court where the appeal was filed: N/A

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Docket or case number (if you know): N/A
Date of the court's decision: N/A
Result (attach a copy of the court's opinion or order, if available): N/A
(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

GROUND THREE: See Attached Memorandum of Law

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
See Attached Memorandum of Law.

(b) Direct Appeal of Ground Three:
(1) If you appealed from the judgment of conviction, did you raise this issue?
Yes ☐ No ☒
(2) If you did not raise this issue in your direct appeal, explain why: N/A

(c) Post-Conviction Proceedings:
(1) Did you raise this issue in any post-conviction motion, petition, or application?
Yes ☐ No ☒
(2) If your answer to Question (c)(1) is "Yes,: state: N/A
Type of motion or petition: N/A
Name and location of the court where the motion or petition was filed: N/A
Docket or case number (if you know): N/A
Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (c)(4) is "Yes," state: N/A

Name and location of the court where the appeal was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

GROUND FOUR: See Attached Memorandum of Law

(a) Supporting facts (do not argue or cite law. Just state the specific facts that support your claim.):
See Attached Memorandum of Law.

(b) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(c) Post-Conviction Proceedings:
(1) Did you raise this issue in any post-conviction motion, petition, or application?
Yes ☐ No ☒
(2) If your answer to Question (c)(1) is "Yes," state: N/A
Type of motion or petition: N/A
Name and location of the court where the motion or petition was filed: N/A
Docket or case number (if you know): N/A
Date of the court's decision: N/A
Result (attach a copy of the court's opinion or order, if available): N/A
(3) Did you receive a hearing on your motion, petition, or application?
Yes ☐ No ☒
(4) Did you appeal from the denial of your motion, petition, or application?
Yes ☐ No ☒
(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?
Yes ☐ No ☒
(6) If your answer to Question (c)(4) is "Yes," state: N/A
Name and location of the court where the appeal was filed: N/A
Docket or case number (if you know): N/A
Date of the court's decision: N/A
Result (attach a copy of the court's opinion or order, if available): N/A

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

13. Is there any ground in this motion that you have *not* previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: N/A

14. Do you have any motion, petition, or appeal *now pending* (filed and not decided yet) in any court for the judgment you are challenging? Yes ☐ No ☒
If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. N/A

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:
Peter V. Birch
Attorney-At-Law
450 Australian Avenue
Suite 500
West Palm Beach, Florida 33401

(a) At preliminary hearing: Same

(b) At arraignment and plea: Same

(c) At trial: Same

(d) At sentencing: Same

(e) On appeal: [illegible]

(f) In any post-conviction proceeding: Pro-se

(g) On appeal from any ruling against you in a post-conviction proceeding: Pro-se

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒
(a) If so, give name and location of court that imposed the other sentence you will serve in the future: N/A
(b) Give the date the other sentence was imposed: N/A
(c) Give the length of the other sentence: N/A
(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☒

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* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

> A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —
>
> (1) the date on which the judgment of conviction became final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;

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18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

Therefore, movant asks that the Court grant the following relief: Petitioner request re-sentencing and not as an armed career offender, and withdrawal of his involuntary plea.

or any other relief to which movant may be entitled.

_____

Signature of Attorney (if any)

---

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Appendix H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO.:
09-60212-CR-MARRA

TITLE 28 U.S.C. 2255
MOTION/PETITION/ MEMORANDUM OF LAW

TABLES INTENTIONALLY OMITTED

JURISDICTION

The Honorable Court has jurisdiction to hear this case, based on Title 28 U.S.C. Section 2255, and Title 28 U.S.C. Section 1291.

STATEMENT OF THE CASE

On 3/19/2009, Petitioner was charged with possession of a weapon and ammunition, according to Title 18 U.S.C. Section 922(g)(1). Petitioner pled guilty to 0-10 years at most. Several days before the Petitioner was to be sentenced, he received a different plea agreement from counsel, involuntarily forcing him to plead out to a 15 year sentence. Petitioner based on duress, coercion, and verbal manipulation from counsel was forced into a 15 year plea, because counsel told Petitioner, he had to take the second plea, regardless of the fact that Petitioner did not want to accept it. Therefore, forcing the petitioner into an involuntary, unintelligent, and unknowing coerced verbal unwanted plea.

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STATEMENT OF THE FACTS

Petitioner was never charged, nor indicted for Title 18 U.S.C. Section 924(g)(1), yet he was enhanced, and labeled an armed career offender, based on state priors that were invalid , inadequate and did not meet the requirements of Petitioner's Fifth and Sixth Amendment rights to be enhanced to armed career offender status, nor were these state priors stated in either of the plea agreements. Thereby, violating the Petitioner's Fifth Amendment right to prepare a defense for these unconstitutional and invalid state priors, that were never listed, and that were inadequately, and invalidly used to unconstitutionally enhance the Petitioner.

Petitioner's plea is therefore, invalid, unconstitutional, involuntary, unintelligent, and unknowingly.

ARGUMENT ONE

Petitioner's Plea Was Involuntary, Unintelligent, And Unknowingly, Based On Counsel's Ineffectiveness

(1). Petitioner's first plea agreement was based on a 0-10 year sentence. However, several months later, Petitioner received a plea for 15 years to life. This is after the Petitioner had given up all of his appeal rights, all of his constitutional rights, and all of his Federal rights. Had Petitioner known, he was going to be declared as an armed career offender, he would have never pled guilty at all, but would have instead, proceeded directly to trial, and proved his innocence in a Court of law.

(2). Counsel had come to an agreement under *Santobello v. New York*, 404 U.S. 257 (1974), with an agreement with the Government for a plea, of 0-10 years, Petitioner had been debriefed, he had proffered, with the Government, and taken full responsibility within the debriefing and proffer, yet on a second plea agreement, sentenced to 15 years in a Federal United States prison, in violation of *Santobello*, *supra*, in violation of his due process to a *Santobello* plea, in violation of his Fifth Amendment right to not be violated of his constitutional rights, his Federal rights, and statutory rights, after he had already pled guilty and waived all of these rights in the first plea, and been *debriefed*, and *proffered*, and then used the very information against the Petitioner that he proffered too, and that he was debriefed on. Thereby, violating the Petitioner's Fifth Amendment right to due process, and equal process of the law, and Petitioner's Sixth Amendment rights to effective assistance of counsel. Had Petitioner known that his debriefing and proffer sessions would be used against him, he would have never pled guilty, but would have instead proceeded directly to trial and proved his innocence in a Court of law, before a just of twelve (12). Had Petitioner known he would be declared an armed career offender, and was not charged as one in his indictment, he would have proceeded directly to trial and proved that he was not an armed career offender, and proved his total innocence in this case in total before a jury of twelve (12). Had Petitioner known that the Government and counsel would renege on the first plea agreement after proffering and debriefing, he would have instead proceeded directly to trial and none of this information could have been use against him.

Had Petitioner known that counsel was misleading him, ill-advising him, and scheming and tricking him into an involuntary, unintelligent and unknowing plea with the Government by all of the stated information in this claim, he would have proceeded directly to trial and proved his innocence in a Court of law.

(3). Petitioner for the first time was told in the second plea agreement that he was potentially being considered as an armed career offender, not that he was one. Had Petitioner known this in advance, he would have never pled guilty and would have challenged his armed career offender status.

(4). Had Petitioner known of counsel's ineffectiveness, he would have requested different counsel other than the ineffective counsel he had.

(5). Petitioner informed counsel that he did not want to take nor accept the second plea agreement, but counsel verbally forced the Petitioner through coercion verbally into accepting the second plea agreement, by telling the Petitioner that he had to accept the second plea agreement. This is after the Petitioner had proffered and debriefed against himself.

(6). In Petitioner's first plea agreement, of June 18, 2010, on Page 19 and Page 20, Line 1-9, petitioner was promised no more than 0-10 years at most. Had Petitioner known he would receive more than the 0-10 years, he would have never pled guilty, but would have instead proceeded directly to trial.

(7). Had Petitioner known that counsel was not going to file the proper objections to his first plea agreement, he would have never pled guilty at all. Because counsel only filed supplemental objections to the enhancements for which Petitioner received, and never objected to the second plea agreement and violations of *Santobello* in it, because Petitioner received and was forced by counsel to plead to an even harsher, and draconian plea agreement in violation of *Santobello*, based on an already agreed upon plea agreement, for more time, that was now breached by the Government and counsel's verbal coercion into forcing the Petitioner into this plea agreement under duress and stress by an ineffective counsel that represented the Petitioner below standards Especially when the Judge in the first plea agreement blatantly stated that Petitioner could receive no more than 0-10 years at most in the first plea agreement.

(8). Had Petitioner known that he would be enhanced for a robbery that did not meet armed career offender requirements, he would have never pled guilty. Petitioner's Florida State prior, CF-96-5680CF10, robbery offense violates *Begay v. United States*, 128 S. t. 1581 (2008); *United States v. Canty*, 570 F.3d 1251 (2010). Petitioner's robbery under Florida State Statute Section 812.13(1) and 812.13(2)(C). (C-6), is ambiguous, vague, and was without any violence and or physical force. It also violates *Descamps v. United States*, U.S. Supreme Court Cite 11-9540.

(9). Petitioner's State of Florida prior for Docket Case No.: 03-17694CF10, battery, Florida State Statute

Section 784.041, Petitioner served 364 days, which was less than a year. Petitioner never pled to any violence, in this case, nor did he ever admit to the crime. Thereby, being improperly used against the Petitioner for an armed career predicate. Petitioner never admitted to any violence aggressive conduct, nor intentional violence in this case. *Begay v. United States*, 128 S. Ct. 1581 (2008); *Johnson v. United States*, 130 S. Ct. 1265 (2010); and *United States v. Skyes*, 131 S. Ct. 2275-76 (2010).

(10). This State of Florida prior therefore, was invalidly used for an armed career offender predicate. Because it does not meet armed career offender status.

(11). Case No.: Docket 961575CF(B), this was a strong arm robbery case, for which the Petitioner, never pled to any violence, and force, nor aggressive conduct. Nor did the Court have the proper state documentation in which to pursue an armed career offender sentence against the Petitioner with this predicate because there was no *Shepard v. United States*, 544 U.S. 17, 26 (2005); *Taylor v. United States*, 495 U.S. 575; nor *Descamps*, material to use in order to arm career the Petitioner, for this predicate nor of the other state predicate mentioned aboved.

(12). Had the Petitioner known that the Court was going to use even this robbery from the State of Florida, Docket No.: 96-1573CF13, which has multimeanings, he would never have pled guilty.

(13). Petitioner objected to Docket No.. 2003-cf-17694 and 1996-cf-005680, they were objected to as being not

crimes of violence. They should never have been used as predicates.

(14). Had Petitioner known that these state priors were going to be used to arm career him, he would have never pled guilty and would have instead proceeded directly to trial. But for counsel's ineffectiveness the proceedings would have been so much different because a presentence report is not evidence, nor is valid documentation which violates *Shepard*, *Taylor*, and *Descamps*, *supras*. Police Reports, booking sheets are all improper such as on this case, because there was no state transcripts, state plea agreements, nor state colloquy to verify Petitioner's state priors as being valid and or proper. Plus Petitioner objected to the use of the presentence report. Petitioner's pleas is therefore, involuntary, unintelligent, and unknowingly. See *Shepard*, *Descamps*, *Taylor*, *Lafler*, *Frye*, *Hill v. Lockhart*, 474 U.S. 52 (1985); and *Padilla v. Kentucky*, 130 S. Ct. 1476 (2010); and *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013), for Petitioner's first state prior.

(15). Counsel prejudiced the Petitioner in this case, for coercing him verbally into a change of plea, knowing that Petitioner did not want to change his plea, and told counsel that he did not. Counsel's prejudice caused the Petitioner to be armed careered and sentenced to 15 years rather than the 0-10 years that the Petitioner had first been promised by the Government and counsel. But for counsel's ineffectiveness, the proceedings would have been so much different. *Strickland v. Washington*, 466 U.S. 668-687 (1984); *Cronic v. United States*, 466 U.S. 648; *Padilla*, *Lockhart*, *Lafler*, and *Frye*, and *United States v. Al Arian*, 514 F.3d 1184, 1190 (11th Cir. 2008).

(16). Petitioner states to the Honorable Court that during the rare II plea colloquy, the Judge stated that he could not sentence Petitioner to no more than 0-10 years. At Petitioner's first bond hearing the Government stated it was seeking to enhance the Petitioner on his state priors, and Petitioner was denied bond, because of these state priors. Counsel was therefore, ineffective for coercing the Petitioner into withdrawing his first initial plea, based on the fact that the Government already had sufficient evidence to enhance Petitioner in the first plea agreement.

(17). Counsel was also ineffective in this case, because had Petitioner proceeded to trial, he would have scored out only to Base Offense Level 17, Category VI, which is 51-63 months. Therefore, had Petitioner proceeded to trial he would have received a significantly lesser sentence, than the draconcian 15 years, that he was involuntarily coerced into in the second plea agreement for which violated Petitioner's first plea agreement. *United States v. Al Arian*, 514 F.3d 1184, 1190 (11th Cir. 2008). But for counsel's ineffectiveness, the proceedings would have been so much different. Counsel's ineffectiveness prejudiced the Petitioner, based on all of the aboved stated reasons, and caused him 15 years in a Federal prison, unintelligently, unknowingly, and involuntarily. *Lafler*, *Frye*, *Hill v. Lockhart*, 474 U.S. 52 (1985); *Davis v. United States*, 417 U.S. 333-346; *Hill v. United States*, 368 U.S. 424-429 (1962); *Schlup v. Delo*, 513 U.S. 298 (1995); *Strickland*, *Cronic*, and *Padilla*, *supras*.

Petitioner request remand of his unintelligent, unknowing, and involuntary plea.

Appendix H

CONCLUSION

Petitioner request that his plea be declared involuntary, unintelligent, and unknowingly, based on all of the aboved stated facts.

December 9, 2013
Dated

Respectfully Submitted,

/s/_____
Gregory Welch
#73675-004
FCC-COLEMAN-MEDIUM
POB 1032
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33521-1032

APPENDIX I — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JUNE 13, 2012

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-14649

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

GREGORY WELCH,

Defendant - Appellant.

June 13, 2012, Decided
June 13, 2012, Filed

Appeal from the United States District Court
for the Southern District of Florida.

Before DUBINA, Chief Judge, FAY, and KLEINFELD,* Circuit Judges.

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* The Honorable Andrew J. Kleinfeld, Senior United States Circuit Judge for the Ninth Circuit, sitting by designation.

Appendix I

KLEINFELD, Senior Circuit Judge:

We address whether consent to a search was voluntary and whether it was "fruit of the poisonous tree." We also address whether a Florida conviction for robbery is a "violent felony" under the Armed Career Criminal Act.

Facts

Broward County sheriff's deputies had probable cause to believe that a John Jacobs had robbed a convenience store. Two people had been shot during the robbery. The deputy sheriffs learned that Jacobs lived with his mother in an apartment complex behind the store, and "frequented" two other apartments there, Gregory Welch's being one of them. Two days after the robbery, thirteen officers went to the three apartments looking for Jacobs. They had not obtained search or arrest warrants. The plan was to have groups of three officers knock simultaneously on the doors and ask whomever was there whether they had seen Jacobs. The police knew what Jacobs looked like, because one of the robbery victims had identified him from a photograph.

Someone other than Jacobs answered the door at Welch's apartment. The three officers at the door asked him if anyone else was there, and he said there was, but would not say who. The police entered and did a "limited protected sweep" to see if anyone inside posed a threat to them. Welch was in a bedroom on the bed talking on a cell phone, smoking a "joint," and minding a baby. The police had drawn their guns before entering the apartment, but holstered them when they saw Welch on the bed.

The police took Welch out onto the balcony. They heard on the police radio that Jacobs had been arrested, so now they were looking only for his gun. They asked Welch if they could search his apartment. He refused. When the police told him they would then have to get a search warrant, which "would take a while," he consented orally and signed a written consent form. It was "four or five minutes, if that" from when the police entered the apartment to when they asked for consent, and another "several" minutes between oral and written consent. The police then searched the apartment, and found Welch's pistol (which was not the gun Jacobs had used in the robbery) and ammunition in "an attic space." After the police found the pistol and cartridges, they put Welch in their van, in the passenger seat and without handcuffs, and he admitted that the pistol and ammunition were his.

Though Welch testified otherwise, the district court found that: (1) the police did not search the apartment until Welch gave his written consent; (2) the police did not threaten to ransack the apartment if he refused consent; (3) the police did not threaten to have the Department of Children and Families take Welch's children away if he refused consent; and (4) the consent form was read and explained to Welch. The district court found that Welch was not intimidated into consenting by the police, as was shown by his initial refusal as well as the plain advice of rights in the form. Rather, the court found, Welch consented because he was not going to be allowed back into the apartment to somehow dispose of the handgun and ammunition, so it made sense for him to agree to the search and hope the police would not find his hiding place.

The district court denied Welch's motion to suppress the pistol and his statements in the police car. The court held that the initial "protective sweep" was unlawful, because the police were not lawfully in the apartment. They entered to do the sweep, instead of doing the sweep because they had lawfully entered and needed to protect themselves after doing so. The question, as the court saw it, was whether the consent to search was voluntary, and whether the discovery of the pistol and Welch's admission were "tainted" by the unlawful entry that led to them. The court held that the consent was voluntary, and that the consent and admission were not tainted.

Welch pleaded guilty to being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1), reserving the right to appeal the denial of his motion to suppress. The presentence report categorized Welch as an armed career criminal because of three prior violent felony convictions, and concluded that the Armed Career Criminal Act required that he be sentenced to a minimum of fifteen years in prison because of these prior convictions.[1] That sentence was imposed, subject to Welch's reservation of the right to challenge it. Only one of the predicate offenses is challenged in this appeal, a 1996 conviction for Florida strong arm robbery.

1. 18 U.S.C. § 924(e)

Appendix I

Analysis

A. The Motion to Suppress

Welch argues that the pistol and ammunition should be suppressed because they were found in an unlawful search, and that his subsequent statements made while he was sitting in the passenger seat of the police car should be suppressed because the putatively unlawful sweep brought them about. The government argues that the initial entry into the apartment was not unlawful, though the district court concluded that it was. We need not decide this question. Even if the sweep was unlawful, the government could avoid suppression if it showed that Welch's consent to the search was voluntary, and that it was not tainted by the unlawful sweep.[2] We, like the district court, so conclude.

Denial of a motion to suppress is a mixed question of law and fact.[3] The district court's findings of fact control unless they are clearly erroneous, but its interpretation and application of law are reviewed de novo.[4]

The first question we address is whether Welch's consent and admissions were "fruit of the poisonous tree," the "poisonous tree" being the putatively unlawful sweep.

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2. *United States v. Delancy*, 502 F.3d 1297, 1308 (11th Cir. 2007).

3. *Id.* at 1304.

4. *Id.*

It is undisputed that the officers who entered Welch's room did so with their guns drawn, but holstered them when they saw that Welch was unarmed. And it is undisputed that Welch consented to the search, first orally and then in writing, within a few minutes of being escorted onto his balcony. Most importantly, it is undisputed that Welch initially refused to consent.

Two precedents control our analysis, *United States v. Santa*[5] and *United States v. States v. Delancy.*[6] In both cases, we considered three factors that gave us a "useful structure" to determine whether a defendant's consent was tainted by illegal police actions: the time elapsed between the illegal act and the search, any intervening circumstances, and the purpose and flagrancy of the unlawful government conduct.[7] In *Santa*, the consent, even if voluntary, "did not purge the primary taint of the illegal entry and arrest.[8] The suspect was still on the floor, handcuffed, three minutes after the DEA had broken down his door and burst into his apartment, when he told them where they could find the drugs. The search and discovery of the evidence were all over by the time he signed the consent form.[9] *Santa* is of no help to Welch, because Welch was standing on the balcony, not

5. *United States v. Santa*, 236 F.3d 662 (11th Cir. 2000).

6. *United States v. Delancy*, 502 F.3d 1297 (11th Cir. 2007).

7. *Id.* at 1309-10.

8. *Santa*, 236 F.3d at 677.

9. *Id.* at 677-78.

handcuffed, when he consented, and he initially refused to consent. No search occurred until he changed his mind. It is one thing to consent to a police request while flat on one's face on the floor and handcuffed, quite another when chatting without any physically forcible coercion after having left the scene of the police intrusion.

This distinction bears on the difference between *Santa* and *Delancy*. *Delancy* assumes, as we do, that the protective sweep was unlawful, but, as in this case, the district court found that the sweep was for the protection of the officers, not a subterfuge to intimidate and question the appellant.[10] Had the entry "been made for the purpose of gaining consent," then the consent would be tainted, because attenuation analysis is unnecessary "when the police act with the express purpose of exploiting an illegal action."[11] That is the central principle of a search that is unconstitutional as "fruit of the poisonous tree" despite voluntary consent.[12] And once inside, albeit unlawfully, the officers neither in *Delancy* nor here acted "flagrantly" by "tear[ing] the house apart."[13] There and here, "timing is not the most important factor."[14] We decide whether consent was tainted by illegality with "a pragmatic

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10. *Delancy*, 502 F.3d at 1312.

11. *Id.*

12. *See Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441 (1963).

13. *Delancy*, 502 F.3d at 1313.

14. *Id.* at 1311.

evaluation of the extent to which the illegal police conduct caused the defendant's response," not with a stopwatch.[15]

"When [police] enter unlawfully but mistakenly and in good faith, and when they obtain the knowing, intelligent, and voluntary consent of a third party without exploiting their unlawful entry in any way, the purposes of the exclusionary rule would not be served by excluding valuable evidence."[16] In this case, as in *Delancy*, there was no such exploitation and is no "taint" such as to make the evidence "fruit of the poisonous tree," if the consent was voluntary.[17] And it was.

We review voluntariness as a factual question that is determined under the totality of the circumstances.[18] Relevant factors include "voluntariness of the defendant's custodial status, the presence of coercive police procedure, the extent and level of the defendant's cooperation with police, the defendant's awareness of his right to refuse to consent to the search, the defendant's education and intelligence, and, significantly, the defendant's belief that no incriminating evidence will be found."[19]

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15. *Id.* at 1310 (internal quotation marks and citations omitted).

16. *Id.* at 1314.

17. *Cf. Oregon v. Elstad*, 470 U.S. 298, 306, 105 S. Ct. 1285, 1291, 84 L. Ed. 2d 222 (1985).

18. *United States v. Blake*, 888 F.2d 795, 798 (11th Cir. 1989).

19. *Id.*

Welch argues he was coerced into giving consent. The officers asked for consent a few minutes after entering his bedroom with their guns drawn. But Welch must not have felt coerced into consenting when they first asked, because he declined to consent. They took him out on the balcony, asked if they could search, and he told them they could not. A person who actually says "no" has not been coerced into saying "yes."

Thus at least up to the time Welch refused to consent, he cannot be said to have been coerced into consenting involuntarily. That leaves, for analysis of coercion and voluntariness, what happened after he said "no." The police officer standing on the balcony with him said, "Fine, but we're going to have to get a search warrant." That is not coercion vitiating voluntariness. And it did not. Welch still did not consent. What changed his mind was the officer's next remark, that "it would take a while."

The explicit threat here is that Welch might have to stand around with nothing to do for some substantial period of time, much as we all do whenever we are stuck in a line. It would be a delicate will indeed that might be overborne by the threat of a period of idleness and wasted time. Yet that threat, "it would take a while," is what changed Welch's "no" to a "yes."[20]

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20. Although Welch testified that the officers threatened to send his children to Child Services if he did not consent, the judge found that he was not telling the truth, and that this did not occur. That threat could not overbear his will, if, as the court reasonably found, it was not made. We do not mean to imply that a warning that social workers will come to care for children if their

The district judge provided a persuasive explanation of why Welch changed his mind. Welch, the court found, "reasonably believed that the officers would eventually be able to obtain a search warrant" and that, because he would have to wait on the balcony while they did, he would not be able to go into the apartment, retrieve the pistol and ammunition, and somehow dispose of them before the police came back with a warrant. So "it made sense for [Welch] to agree to the search rather than wait for the warrant to be obtained and, because of where the items were hidden, hope for the best." That was a rational gamble, but one that Welch lost. Welch's consent was not coerced, just constrained, by having to place his bet on one of two poor alternatives. Maybe if he let them in, the police would want to get the search done quickly and fail to find his contraband. Or maybe if he put them to the trouble of getting a search warrant, they would search more thoroughly because he had inconvenienced them.

The district court's findings were supported by the evidence and its conclusion that Welch gave legally efficacious consent to the search was correct.

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adult caregivers become unavailable on account of detention is necessarily an improperly coercive threat, as opposed to helpful information assuring that children will not be abandoned to the street.

B. Whether Florida Robbery Is a "Violent Felony"

The ordinary maximum sentence for being "a felon in possession of a firearm" is ten years imprisonment.[21] But if a felon in possession has three previous convictions for violent felonies or serious drug offenses, then the Armed Career Criminal Act requires a minimum sentence of fifteen years imprisonment.[22] Welch had three previous potentially qualifying convictions when he was sentenced to this statutory minimum. He argues on appeal that his 1996 Florida conviction for strong arm robbery does not qualify as a "violent felony." If that conviction were not counted as a predicate offense, he would not be subject to the statutory minimum.

The parties argue the case primarily under the categorical approach, not the modified categorical approach.[23] The record cognizable for purposes of the statutory enhancement is sparse. The presentence report says that according to the victim, Welch punched him in the mouth, fought with him, and grabbed his gold bracelet from his wrist, while another robber took the gold chain from the victim's neck. But the presentence report does

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21. 18 U.S.C. §§ 922(g)(1), 924(a)(2).

22. 18 U.S.C. § 924(e).

23. "Under [the categorical] approach, we look only to the fact of conviction and the statutory definition of the prior offense, and do not generally consider the particular facts disclosed by the record of conviction." *James v. United States*, 550 U.S. 192, 202, 127 S. Ct. 1586, 1594, 167 L. Ed. 2d 532 (2007) (internal quotation marks and citations omitted).

not state the source of this information, and the record merely includes an information alleging that Welch unlawfully took jewelry from the victim's person "by the use of force, violence, assault, or putting . . . in fear," and a judgment showing that Welch pleaded guilty to this information, and was convicted of "strong arm robbery" in violation of Florida Statute Section 812.13(1). We decide this issue under the categorical approach.

The federal Armed Career Criminal Act defines "violent felony" as felonies that have as an element the "use, attempted use, or threatened use of physical force," or that are "burglary, arson, or extortion, involve[] use of explosives, or otherwise involve[] conduct that presents a serious potential risk of physical injury to another."[24] Welch's Florida robbery conviction was pursuant to a statute that criminalized stealing property from another's person or custody using "force, violence, assault, or putting in fear."[25]

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24. "[T]he term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year . . . that--(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]" 18 U.S.C. § 924(e)(2)(B).

25. "'Robbery' means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1).

Welch's argument is that the degree of "force" required to violate the state statute at the time of his conviction was too slight to satisfy the federal statute. His point is that Florida law at the time made mere snatching a robbery, and that mere snatching is not forceful enough to satisfy the federal statute under either the "elements clause" or the "residual clause" ("serious potential risk of physical injury to another") of the federal statute. We review de novo whether a prior crime qualifies as a violent felony under the statute.[26] In "determining whether a defendant was convicted of a 'violent felony,' we [turn] to the version of state law that the defendant was actually convicted of violating."[27]

In 1996, when Welch pleaded guilty to robbery, Florida law clearly established that a taking by stealth, as in pickpocketing where the victim is not aware of the theft, was merely larceny, not robbery.[28] But the state courts of appeal were divided on whether a snatching, as of a purse, or cash from a person's hand, or jewelry on the person's body, amounted to robbery.[29] Subsequently,

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26. *United States v. McGill*, 618 F.3d 1273, 1274-75 (11th Cir. 2010).

27. *McNeill v. United States*, *U.S.*, 131 S. Ct. 2218, 2222, 180 L. Ed. 2d 35 (2011).

28. *See McCloud v. State*, 335 So. 2d 257, 258-59 (Fla. 1976).

29. *See, e.g., Goldsmith v. State*, 573 So. 2d 445, 445 (Fla. 2d Dist. Ct. App. 1991) (holding that the "slight force used to remove the bill from [the victim's] hand" was "insufficient to constitute the crime of robbery"); *A.J. v. State*, 561 So. 2d 1198, 1198 (Fla. 3d Dist. Ct. App. 1990) (holding that "the degree of force

a new Florida statute established the crime of "robbery by sudden snatching," in between larceny and robbery.[30] This statute appears to have been a legislative response to a 1997 Florida Supreme Court decision holding that "there must be resistance by the victim that is overcome by the physical force of the offender" to establish robbery, so that the intermediate appellate decisions holding mere snatching to be sufficient were put in doubt.[31] Welch pleaded guilty before the Florida Supreme Court decision and the new statute, in a judicial district that had not yet

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used to [grab a camera hanging from the victim's shoulder] was insufficient to constitute robbery"); *Larkins v. State*, 476 So. 2d 1383, 1385 (Fla. 1st Dist. Ct. App. 1985) (holding that "sufficient force was exercised to fulfill the requirements of the robbery statute" where the robber grabbed cash out of the victim's hand); *Andre v. State*, 431 So. 2d 1042, 1043 (Fla. 5th Dist. Ct. App. 1983) (holding that "the act of 'snatching' money from another's hands is force and that force will support a robbery conviction").

30. "'Robbery by sudden snatching' means the taking of money or other property from the victim's person, with intent to permanently or temporarily deprive the victim or the owner of the money or other property, when, in the course of the taking, the victim was or became aware of the taking. In order to satisfy this definition, it is not necessary to show that: (a) The offender used any amount of force beyond that effort necessary to obtain possession of the money or other property; or (b) There was any resistance offered by the victim to the offender or that there was injury to the victim's person." Fla. Stat. § 812.131 (2000).

31. *Robinson v. State*, 692 So. 2d 883, 886 (Fla. 1997) (holding that robberies must "be accomplished with more than the force necessary to remove the property from the person").

spoken definitively on the question,[32] and at a time when the controlling Florida Supreme Court authority held that "any degree of force" would convert larceny into a robbery.[33] So we assume for purposes of analysis that Welch pleaded guilty to robbery at a time when mere snatching sufficed.[34]

United States v. Lockley holds that Florida attempted robbery is a "crime of violence" under the Sentencing Guidelines.[35] Welch argues that we should distinguish *Lockley* for two reasons. First, Welch points out that *Lockley* held that Florida attempted robbery is a "crime of violence" under the Sentencing Guidelines,[36] while

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32. *See Santiago v. State*, 497 So. 2d 975, 976 (Fla. 4th Dist. Ct. App. 1986) (holding that where a defendant reached into a car and tore necklaces off of a victim's neck, leaving scratch marks, evidence of force was sufficient to support a robbery because the "facts of this case, unlike picking a pocket or snatching a purse without any force or violence, show sufficient force, *be it ever so little*, to support robbery") (emphasis added).

33. *McCloud v. State*, 335 So. 2d 257, 258-59 (Fla. 1976).

34. "A federal court applying state law is bound to adhere to decisions of the state's intermediate appellate courts absent some persuasive indication that the state's highest court would decide the issue otherwise." *Silverberg v. Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678, 690 (11th Cir. 1983).

35. *United States v. Lockley*, 632 F.3d 1238, 1246 (11th Cir. 2011).

36. "The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--(1) has as an element the use, attempted

the issue here is whether Florida robbery is a "violent felony" under the Armed Career Criminal Act.[37] Second, Welch argues that we should distinguish *Lockley* because Lockley was convicted after Florida promulgated the "sudden snatching" statute, so snatching from the person might furnish the basis for a robbery conviction here but not in *Lockley*.

We conclude that even though these distinctions may fairly be made, they should make no difference. We have recognized that the definitions of "crime of violence" under the Sentencing Guidelines and "violent felony" under the Armed Career Criminal Act are "virtually identical," and have held that "[c]onsidering whether a crime is a 'violent felony' is similar to considering whether a conviction qualifies as a 'crime of violence[.]'"[38] We see no reason not to apply *Lockley* to a case addressing whether Florida robbery is a "violent felony" under the Armed Career Criminal Act.

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use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a) (2002).

37. "[T]he term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year . . that--(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]" 18 U.S.C. § 924(e)(2)(B).

38. *U.S. v. Alexander*, 609 F.3d 1250, 1253 (11th Cir. 2010) (internal quotation marks and citations omitted).

We also see no reason not to apply *Lockley* to 1996 Florida robbery, even if robbery at that time could be accomplished by mere snatching. Welch's strongest argument comes from a footnote in *Lockley* distinguishing the new "robbery by sudden snatching" statute. It notes that while sudden snatching involves "pick-pocketing or other similar activity (so long as the victim is in possession of the money or property and realizes he is being victimized)," robbery under the Florida robbery statute "concerns a far more aggressive and potentially violent form of robbery."[39] Though *Lockley* does not reach the question of whether robbery by sudden snatching would or would not present "a serious risk of physical injury to another" under the residual clause, we conclude that it does.

Welch correctly points out that under *Johnson v. United States*, "physical force" means not merely what "force" means in physics, but "*violent* force--that is, force capable of causing physical pain or injury to another person."[40] That *Johnson* discussion was in the context of the elements clause requirement of "physical force," not the residual clause requirement of "serious risk of potential injury to another." Arguably the elements clause would not apply to mere snatching, but the issue is not cut and dried. We need not decide whether snatching is sufficiently violent under the elements clause, though, because it suffices under the residual clause.

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39. *Lockley*, 632 F.3d at 1246 n.7.

40. *Johnson v. United States*, *U.S.*, 130 S. Ct. 1265, 1271, 176 L. Ed. 2d 1 (2010).

We look at the statute of conviction to see whether, under the residual clause, "the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another."[41] Under *United States v. Harrison*, we apply a three-step analysis to see: (1) how the crime is ordinarily committed; (2) whether the crime poses a "serious potential risk of physical injury," similar in degree to the listed crimes; and (3) whether the crime is similar in kind to the listed crimes, or, using the language from *Begay v. United States*, whether the crime is "purposeful, violent, and aggressive."[42] *Sykes v. United States* partially abrogated *Harrison*,[43] and we recently revisited *Harrison* in *United States v. Chitwood*.[44] *Chitwood* limits *Begay*'s "purposeful, violent, and aggressive" language to "strict liability, negligence, and recklessness crimes."[45] Offenses that are not "strict liability, negligence, and recklessness crimes," like robbery, fall within the residual clause "if they categorically pose a serious risk of physical injury that is similar to the risk posed by one of the enumerated

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41. *James*, 550 U.S. at 202, 208.

42. *United States v. Harrison*, 558 F.3d 1280, 1287 (11th Cir. 2009); *Begay v. United States*, 553 U.S. 137, 145, 128 S. Ct. 1581, 1586, 170 L. Ed. 2d 490 (2008).

43. *Sykes v. United States, U.S.*, 131 S. Ct. 2267, 2277, 180 L. Ed. 2d 60 (2011).

44. *United States v. Chitwood*, 676 F.3d 971 (11th Cir. 2012).

45. *Id.* at 979; *United States v. Schneider*, __ F.3d __, 2012 WL 1868645, at *5 (11th Cir., May 24, 2012).

crimes."[46]

Sudden snatching ordinarily involves substantial risk of physical injury to the victim. The victim's natural reaction is likely to be to try to hold on to his or her money or property, leading in many cases to serious injury. For example, in the Florida Supreme Court case with the "any degree of force" language, the old woman died from the fall she took when the robber grabbed her purse in a parking lot.[47] In that respect, the crime is much like burglary, where if the victim perceives what is going on, a violent encounter is reasonably likely to ensue.[48]

We conclude that Florida robbery, both before and after Florida promulgated the "robbery by sudden snatching" statute, qualifies as a violent felony under the Armed Career Criminal Act.

AFFIRMED.

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46. *Id.*

47. *McCloud v. State*, 335 So. 2d 257, 258 (Fla. 1976).

48. "The main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party--whether an occupant, a police officer, or a bystander--who comes to investigate." *James*, 550 U.S. at 203, 127 S. Ct. at 1594.

APPENDIX J — SECOND PLEA AGREEMENT, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, ENTERED SEPTEMBER 20, 2010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-CR-60212-KAM

UNITED STATES OF AMERICA

VS.

GREGORY WELCH,

Defendant.

PLEA AGREEMENT

The United States of America and Gregory Welch (hereinafter referred to as the "Defendant") enter into the following agreement:

1. The Charges to which the Defendant Is Pleading Guilty: The Defendant agrees to plead guilty to the sole Count of the Indictment. That Count charges that, on or about March 19, 2009, in Broward County, in the Southern District of Florida, the Defendant, having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition in and affecting interstate and foreign commerce, that is: (a) one (1) Lorcin, Model L380, .380-caliber semi-automatic pistol, serial number 532504;

(b) five (5) rounds of Winchester .380-caliber ammunition; and (c) one (1) round of Remington .380-caliber ammunition; any one of which being a violation; in violation of Title 18, United States Code, Section 922(g)(1).

2. The Elements of the Offenses of Conviction: The elements of the offense of possession of a firearm and ammunition by a convicted felon, in violation of Title 18, United States Code, Section 922(g)(1), as charged in the sole Count of the Indictment, are as follows:

First, that the Defendant knowingly possessed a firearm in or affecting interstate commerce, as charged; and

Second, that before the Defendant possessed the firearm, the Defendant had been convicted in a court of a crime punishable by imprisonment for a term in excess of one year, that is, a felony offense.

3. Statutory Penalties: The Defendant also understands and acknowledges that, as to the sole Count of the Indictment, the Court must impose a mandatory minimum sentence of fifteen (15) years' imprisonment, and may impose a maximum sentence of life imprisonment, to be followed by up to five (5) years' supervised release, and may impose a fine of $250,000. The Defendant understands and acknowledges that a violation of the terms of his supervised release can result in additional criminal penalties.

4. Special Assessment: The Defendant further understands and acknowledges that, in addition to the sentence imposed under paragraph 3 of this Agreement, a special assessment in the amount of $100 will be imposed. The Defendant agrees that any special assessment imposed shall be paid at the time of sentencing.

5. Applicability of Sentencing Guidelines: The Defendant is aware that the sentence will be imposed by the Court after considering the Federal Sentencing Guidelines and Policy Statements (hereinafter "Sentencing Guidelines"). The Defendant acknowledges and understands that the Court will compute an advisory sentence under the Sentencing Guidelines and that the applicable guidelines will be determined by the Court relying in part on the results of a Pre-Sentence Investigation by the Court's Probation Office, which investigation will commence after the entry of the Defendant's guilty plea. The Defendant is also aware that, under certain circumstances, the Court may depart from the advisory sentencing guideline range that it has computed, and may raise or lower that advisory sentence under the Sentencing Guidelines. The Defendant further understands that the Court is required to consider the advisory guideline range determined under the sentencing guidelines, but is not bound to impose that sentence; the Court is permitted to tailor the ultimate sentence in light of other statutory concerns, and such sentence may be either more severe or less severe than the Sentencing Guidelines' advisory sentence. Knowing these facts, the Defendant understands and acknowledges that the Court has the authority to impose any sentence within and up to

the statutory maximum authorized by law for the offense identified in paragraph 1 and that the Defendant cannot withdraw his guilty plea solely as a result of the sentence imposed.

6. Rights Waived by Pleading Guilty: The Defendant understands that by pleading guilty, he knowingly and voluntarily waives the following rights:

a. the right to plead not guilty and to persist in a plea of not guilty;

b. the right to a speedy and public trial before a jury of his peers;

c. the right to the effective assistance of counsel at trial, including, if the Defendant could not afford an attorney, the right to have the Court appoint an attorney for the Defendant;

d. the right at trial to be presumed innocent until guilt has been proven beyond a reasonable doubt by the United States;

e. the right at trial to confront and cross-examine witnesses against the Defendant;

f. the right to compel or subpoena the testimony of witnesses and other evidence to present at trial;

g. the right at trial to testify or to remain silent, and the right that such silence could not be used against the Defendant;

h. the right to challenge the sufficiency of the indictment; and

I. the right to appeal any pretrial rulings or a finding of guilt.

7. Government's Right to Disclose Information to the Court: The Office of the United States Attorney for the Southern District of Florida (hereinafter "Office") reserves the right to inform the Court and the Probation Office of all facts pertinent to the sentencing process, including all relevant information concerning the offenses committed, whether charged or not, as well as concerning the Defendant and the Defendant's background. Subject only to the express terms of any agreed-upon sentencing recommendations contained in this Agreement, this Office further reserves the right to make any recommendation as to the quality and quantity of punishment.

8. Acceptance of Responsibility: The United States and the Defendant agree that, although not binding on the Probation Office or the Court, they will jointly recommend that the Court should reduce by two levels the sentencing guideline level applicable to the Defendant's offense, pursuant to Section 3E1.1 of the Sentencing Guidelines, based upon the Defendant's recognition and affirmative and timely acceptance of personal responsibility. If at the time of sentencing the Defendant's offense level

is determined to be 16 or greater, and the Defendant complies with the requirements of Section 3E1.1, the United States will make a motion requesting an additional one-level decrease pursuant to Section 3E1.1(b) of the Sentencing Guidelines, stating that the Defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the Court to allocate their resources efficiently.

9. Limitation on Joint Sentencing Recommendations: The Defendant understands and agrees that the United States will not be required to make the motion and sentencing recommendation set forth in paragraph 8 if the Defendant: (a) fails or refuses to make a full, accurate and complete disclosure to the Probation Office of the circumstances surrounding the relevant offense conduct; (b) is found to have misrepresented facts to the government prior to entering this plea agreement; or (c) commits any misconduct after entering into this plea agreement, including but not limited to committing a state or federal offense, violating any term of release, or making false statements or misrepresentations to any governmental entity or official.

10. Factual Proffer: The Defendant, his counsel, and the United States further agree that had this case proceeded to trial, the United States would have introduced the following evidence, which is sufficient to support a guilty plea and proves beyond a reasonable doubt

that the Defendant is guilty of the crime charged in the sole Count of the Indictment:

On March 17, 2009, law enforcement officers searched Defendant's apartment. A Lorcin, Model L380, .380-caliber semi-automatic pistol, serial number 532504, was found in the attic space in the apartment. The firearm was loaded with six (6) rounds of ammunition, five (5) of which were Winchester .380-caliber ammunition, and one (1) of which was Remington .380-caliber ammunition. After the items were found, Defendant gave a recorded statement admitting to possession of the firearm and ammunition. The firearm and all six (6) rounds of ammunition have traveled in interstate or foreign commerce. The Defendant is a previously convicted felon.

11. No Promises or Representations Regarding Ultimate Sentence: The Defendant is aware that the sentence has not yet been determined by the Court. The Defendant also is aware that any estimate of the probable sentencing range or sentence that the Defendant may receive, whether that estimate comes from the Defendant's attorney, the government, or the probation office, is a prediction, not a promise, and is not binding on the government, the probation office, or the Court. The Defendant understands further that any recommendation that the government makes to the Court as to sentencing, whether pursuant to this agreement or otherwise, is not binding on the Court and the Court may disregard the recommendation in its entirety. The Defendant acknowledges that no one has promised or guaranteed what sentence the Court will impose. The

Defendant understands and acknowledges, as previously acknowledged in paragraph 5 above, that the Defendant may not withdraw his plea based upon (a) the Court's decision not to accept a sentencing recommendation made by the Defendant and/or the government, or (b) the fact that he received an incorrect estimate of the sentence that he would receive, whether that estimate came from his attorney, the United States, and/or the Probation Office.

12. Voluntariness of Plea: The Defendant agrees that he has entered into this Plea Agreement freely and voluntarily, and that no threats or promises, other than the promises contained in this written Plea Agreement, were made to induce the Defendant to enter his plea of guilty.

13. Forfeiture and Consent to Disposal/Destruction of Firearm and Ammunition: The Defendant agrees to forfeit all interests in any firearm or ammunition that is the subject of the Indictment, which the Defendant currently owns or has previously owned, or over which the Defendant currently, or has in the past, exercised control, directly or indirectly. This includes, but is not limited to,

(a) one (1) Lorcin, Model L380, .380-caliber semi-automatic pistol, serial number 532504;

(b) five (5) rounds of Winchester .380-caliber ammunition; and

(c) one (1) round of Remington .380-caliber ammunition.

Defendant further agrees to hold the United States, its agents, and employees harmless from any claims whatsoever in connection with the seizure or destruction of property covered by this agreement. The Defendant agrees that this property may be destroyed or disposed of in accordance with the policies and procedures of the custodial agency. The Defendant further agrees to waive all constitutional and statutory challenges in any manner (including direct appeal, habeas corpus, or any other means) to any destruction or disposal of property carried out in accordance with this Plea Agreement on any grounds, including that the forfeiture constitutes an excessive fine or punishment. Defendant acknowledges that all property covered by this agreement is subject to forfeiture as property involved in illegal conduct related to the sole Count of the Indictment.

14. Conditional Appeal. Pursuant to Federal Rule of Criminal Procedure 11(a)(2), the United States consents to the Defendant's entry of a conditional plea of guilty and a reservation of the right to have an appellate court review the district court's denial of his motion to suppress the physical evidence, specifically, the Lorcin, Model L380, .380-caliber semi-automatic pistol, serial number 532504; the five (5) rounds of Winchester .380-caliber ammunition; and the one (1) round of Remington .380-caliber ammunition. The United States and the Defendant agree that the suppression issue pertaining to the physical evidence is case dispositive.

15. Entire Agreement: This is the entire agreement and understanding between the United States and the

Defendant. There are no other agreements, promises, representations, or understandings. This Agreement binds only the United States Attorney's Office for the Southern District of Florida. It does not bind any other United States Attorney's Office, or any other office or agency of the United States, or any state or local prosecutor.

WIFREDO A. FERRER
UNITED STATES ATTORNEY

Date: 9/17/10 By: /s/_____
JASON LINDER
ASSISTANT UNITED STATES ATTORNEY

Date: 9/8/10 By: /s/_____
GREGORY WELCH,
DEFENDANT

Date: 9/8/10 By: /s/_____
PETER BIRCH
ATTORNEY FOR DEFENDANT

APPENDIX K — JUDGMENT, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, ENTERED SEPTEMBER 20, 2010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FT. LAUDERDALE DIVISION

Case Number - 0:09-60212-CR-MARRA-1

UNITED STATES OF AMERICA

v.

GREGORY WELCH

JUDGMENT IN A CRIMINAL CASE

The defendant pleaded guilty to Count One of the Indictment on September 17, 2010. The defendant is adjudicated guilty of the following offense:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 922(g)(1)	Possession of a firearm by a convicted felon	March 19, 2009	One

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Appendix K

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
9/17/10

/s/
KENNETH A. MARRA
United States District Judge

September 20, 2010

Appendix K

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **180 months** as to Count One of the Indictment.

The Court makes the following recommendations to the Bureau of Prisons:

> The defendant be designated to FCI - Miami and that he enter the Bureau of Prisons 500 hour Drug Treatment Program.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshall

By: _____
Deputy U.S. Marshall

Appendix K

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **Three (3) years.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

Appendix K

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance

or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Appendix K

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

Appendix K

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment	Total Fine	Total Restitution
$100.00	$	$

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

Appendix K

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$100.00** due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Appendix K

Forfeiture of the defendant's right, title and interest in certain property is hereby ordered consistent with the plea agreement.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX L — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, DATED SEPTEMBER 17, 2010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 09-60212-CR-MARRA

UNITED STATES OF AMERICA,

Government,

-v-

GREGORY WELCH,

Defendant.

West Palm Beach, Florida

September 17, 2010

TRANSCRIPT OF CHANGE OF PLEA
AND SENTENCING PROCEEDINGS

BEFORE THE HONORABLE
KENNETH A. MARRA

UNITED STATES DISTRICT JUDGE

Appendix L

[2](Call to the order of the Court.)

THE COURT: Good afternoon, please be seated.

All right. This is the case of the United States of America versus Gregory Welch, Case Number 09-60212-CR-MARRA.

May I have counsel state their appearances, please.

MR. LINDER: Good afternoon, Your Honor. Jason Linder, on behalf of the United States.

MR. BIRCH: Good afternoon, Your Honor. Peter Birch, representing Gregory Welch, who's seated to my left.

THE COURT: Good afternoon.

All right. So as I understand it, Mr. Welch is going to be repleading to the charges based -- and his prior plea agreement is being, I guess, voided by both parties; is that correct?

MR. LINDER: Yes, Your Honor.

What happened is when he pled initially, neither party contemplated that he would be an armed career criminal. The PSI came back and indicated that he is, although Mr. Birch I think has a different view about that.

Appendix L

To make sure that there's no Rule 11 problem, nothing that will later have it set aside on habeas, the safer course is to vacate the old plea and redo a Rule 11 colloquy where the Defendant is advised of his new maximum penalties. Also, there is a revision to the plea agreement. The plea agreement is the same as the original one, except that there is no [3]longer an appellate waiver so that he can appeal both the suppression ruling that Your Honor made and the sentence that will likely be imposed today.

THE COURT: Okay. And is that correct, Mr. Birch?

MR. BIRCH: Yes, Your Honor. He is potentially an armed career criminal, and everything that Mr. Linder said is correct.

To avoid interrupting the Court during the plea colloquy, I'd just like to have it noted that even though it does state in the plea agreement that he's facing a mandatory minimum of 15 years to a maximum of life, that's assuming the Court does find he's an armed career criminal, which we're reserving the right to litigate after the plea.

* * *

[20]THE COURT: In the case of the United States of America versus Gregory Welch, it's the finding of the Court [21]that the Defendant is fully competent and capable of entering an informed plea, that he is aware of the nature of the charge and the consequences of his plea, that his plea of guilty is a knowing and voluntary plea,

supported by an independent basis in fact containing each of the essential elements of the offense.

The plea is therefore accepted, and the Defendant is now adjudged guilty of the one count of the indictment.

All right. You can have a seat, Mr. Welch.

All right. I'm going to find, based on the fact that we have a presentence report already prepared relative to the first plea agreement, that I have sufficient information to exercise meaningful sentencing authority, and we don't need to do another presentence report. I guess the report I have, though, doesn't have the guidelines under the new — the recommendation I have under the old report is a 120-month maximum.

Did you do a new blue sheet?

PROBATION OFFICER: No, Your Honor. I'm sorry, we did not.

THE COURT: Okay. So it's still a -- is it offense level 30?

PROBATION OFFICER: The only information that would change based upon the form that Your Honor's referring to would be the custody range and the supervised release range, [22]as well.

THE COURT: All right.

PROBATION OFFICER: So the offense level and the criminal history would be correct.

THE COURT: All right. So it's 15 years to life is the -- is the statutory provision range, right?

PROBATION OFFICER: That is correct. Then the custody range for this particular defendant would be 168 to 210 months.

THE COURT: With a 180 minimum mandatory?

PROBATION OFFICER: Correct.

THE COURT: All right. What else changes? Doesn't the supervised release change?

PROBATION OFFICER: The supervised release change is a minimum of five years?

MR. LINDER: Maximum of five years.

PROBATION OFFICER: You're correct.

MR. LINDER: It goes from a max of three to a max of five.

THE COURT: What's the guideline supervised release range, is it three to five years?

PROBATION OFFICER: No, that would remain the same.

THE COURT: Two to three?

Okay. Does the fine range change?

PROBATION OFFICER: No, the fine range remains the [23]same.

THE COURT: Okay. All right. So Mr. Birch, you want to be heard on your objections to the guideline calculations, the new guideline calculations?

MR. BIRCH: Yes, Your Honor.

First, it was an oversight on my part to not object under Apprendi and its progeny that the sentence cannot be enhanced based on convictions that were not set forth in the indictment. I filed a supplemental objection to preserve this. This is the Apprendi objection that candidly we make in every case, at the same time recognizing Almendarez-Torres compels the Court to overrule that objection. We're simply making that objection to preserve it for appellate purposes.

That having been said, I -- if I could work backwards for a second. I don't want anything that I say to be understood as withdrawing anything that I've said -- or, excuse me, anything that I've objected to by way of a written objection. I would certainly adopt all of the objections that I made in writing and have filed with the Court. But having said that, I'd like to work backwards.

Appendix L

I filed a sentencing memorandum that address the felony battery conviction, because, quite candidly, I was close to conceding that one. But then I thought about it further, researched Florida case law and decided not to waive that objection, and here's why.

[24]I filed a copy of the information on the felony battery and the judgment for the felony battery and also a transcript of the plea colloquy. And I would concede, as I read the case law, federal and state -- well, federal for the moment -- that the way the information reads in this felony battery statute would constitute a crime of violence, in that it has the what I refer to as the "to wit" provision in the information, which states, "by striking John Andrew on the head with the hammer or other blunt object." And that's why I nearly conceded it.

And then thought, in reviewing the transcript, which struck me as odd, is that it's a plea of no contest before the Broward circuit court judge. That didn't strike me as odd. What struck me as odd was that there is not even any mention of a factual basis; it's never discussed. And then in the judgment there's no factual finding.

So I would submit that because there was never an admission by the Defendant as to that "to wit" phrase, and that since they're all -- and there was never any finding by the Court as to that phrase, and since the crime can be committed in an alternative manner, that that should not be binding on whether or not it is a crime of violence.

Now, I want to say that in researching this, and I simply ran out of time, Florida case law seems to suggest that if you plead it a certain way, you have to prove it that way. [25]Yet, I did find some other cases that suggested that if that did not happen but there is no objection, it's something that's waivable.

So the bottom line is that I would submit that since that factual element, the "to wit" phrase, was never addressed by either the Defendant or the Court, that under Johnson, the United States Supreme Court case dealing with felony battery, that it is not a crime of violence. Now, of course, Johnson dealt with a felony battery based on a prior conviction, so that is distinguishable from this. But given what I just said, I would submit that it's not a crime of violence.

That's my argument as to the felony battery.

Now, the robbery conviction -- and I'm speaking specifically about the robbery conviction. There are two that remain, are mentioned in the indictment. One was actually an attempted robbery. I'm referring to the robbery that's referred to as Case Number 1996-CF-005680. That conviction doesn't have -- that's where my sentencing memorandum, I attached a copy of the information in that case, along with the judgment, and there is no limiting language in the robbery case. It simply states that the robbery was committed by the use of force, violence, assault or putting in fear the victim.

My argument there is twofold. One is under Florida law, a robbery can be committed with a minimal amount of force. Under the United States Supreme Court of Johnson [26]that's cited in my sentencing memorandum, the force has to be to the degree -- they refer to it as physical force, meaning violent force. That is, force capable of causing physical pain or injury to another person. And I would submit that the force required under the Florida robbery statute does not meet the definition of force under Johnson.

Now, my other argument in this matter regarding the robbery conviction is that regardless of the degree of force, the statute reads "force, violence, assault or putting in fear," therefore giving you these alternative ways. And I would submit that the alternative ways do not always constitute a crime of violence. There's no physical -- under the Begay case, there's no purposeful -- it's reading as I cite, I believe, in -- yeah, purposeful, violent and aggressive conduct is how Begay defined a crime of violence. And I would submit that given the way the Florida Statute of robbery is written, that that does not require a purposeful, violent and aggressive act and therefore is not a crime of violence, particularly the putting in fear case -- part.

And I would -- and I didn't mention this in my sentencing memorandum, but there -- I just found out the other day I had -- it's a South Carolina case out of I think it's Rosemond, R-o-s-e-m-o-n-d, and I have it if the Court wants to see it. Interestingly enough, it was somebody who walked in and glared at the cashier in a store and didn't say anything, [27]went into the restroom

of the store, came out, and it's when he came out that he was glaring at her, and she got frightened and ran from that area of the store, and then he picked up a cash register and badged it open, and the South Carolina court found that was sufficient to put somebody in fear.

And then there was an old case I believe that I cited in my -- yes, in the Florida case, Montsdoca versus State, which is cited in my sentencing memorandum -- Montsdoca, M-o-n-t-s-d-o-c-a -- it makes reference to putting in fear as referring to telling somebody, I'm going to take this, and if you don't -- if you try to stop me, I'm going to accuse you of some act of sodomy or something like that. It makes reference to that. Doesn't hold that, but it just shows there are other ways.

Now, having said that, I want to point out to the Court that all the case law that I have found talks about the fear aspect under Florida law, that it's fear of death or great bodily harm. So I just wanted to qualify that.

It's just interesting though. My point being is that you don't need to commit a purposeful aggressive act to commit robbery under Florida law, that it can be done with minimal force or minimal conduct that causes the victim to respond in a certain way, and that that doesn't meet the definition in federal law as a crime of violence. So because of that, it's our position that the robbery conviction mentioned in my [28]sentencing memorandum is not a crime of violence. And to be clear, we're not challenging the other robbery.

And that's it.

THE COURT: Thank you.

Mr. Linder?

MR. LINDER: Thank you, Your Honor.

I had intended to rely just on the probation's response to the original objections. I filed something very briefly this afternoon, Your Honor, in response to the three filings that were made this week. I don't know if you have it in front of you.

THE COURT: I got it. I read it.

MR. LINDER: Okay. Good. It was very short.

Let's take the felony battery first.

Mr. Birch analyzes it under what the Supreme Court calls the modified categorical approach, looking at the face of the information and the judgment. I don't think you need to go that far.

Under the categorical approach, the felony battery statute under which Mr. Welch was convicted is plainly a crime of violence. As the Court will recall, the Supreme Court decided earlier this year that a different felony battery statute was not necessarily a crime of violence. That was Johnson versus United States. That was the recidivist statute that said if you've done it in the past, committed misdemeanor [29]battery, you do it again, it's a felony.

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The statute under which Mr. Welch was convicted requires as one of its elements proof of great bodily harm, permanent disability or permanent disfigurement. There is no way to commit that crime that doesn't satisfy the Johnson requirement of force capable of causing physical pain or injury to another person. So it seems to me that as a categorical matter, that statute is plainly a crime of violence.

Were you to choose instead to look at it as a modified categorical issue, Mr. Birch is also correct that the face of the information satisfies that analysis, as well. The information does say he committed the crime, to wit -- I forget the exact language; I can pull it -- hitting somebody about the head.

And I would note for the Court that while it's true the plea colloquy contains no sort of factual proffer per se, the Defendant's lawyer, at page 7 of the colloquy that was submitted, does concede that Mr. Welch, in fact, beat the victim around the head. He was talking now about how it had been two years ago, and that was water under the bridge, and he said, it was two years ago, the head is healed. So he concealed the crime happened the way it was alleged in the information.

Turning to the robbery. One of the cases that I [30]submitted this morning or this afternoon was United States versus Pitts. That is an Eleventh Circuit decision from less than three weeks ago deciding that as a categorical matter, a California robbery statute was a crime of violence. The language is somewhat different,

it required force or fear, but it's functionally identical to the robbery statute under which Mr. Welch was convicted earlier. And what the Court held there was that there's no way to put somebody in fear other than fear of physical harm, and so that's enough to qualify.

As to the degree of force involved, you know, I guess I would concede that the statute doesn't have a requirement in about how much. I would contrast it with the robbery by snatching sub-statute, which explicitly says no force is required beyond that required to physically grab whatever item is being snatched; whereas here, this is robbery by use of force, assault, fear, intimidation. It seems to me that's also categorically a crime of violence.

That's all I really have.

THE COURT: Thank you.

Anything else, Mr. Birch?

MR. BIRCH: I suppose I should just simply note that this Pitts case that I scanned over, receiving it only a little bit ago, but I just wanted to point out, as the Court I'm sure is aware, it's an unpublished opinion having no precedential value whatsoever. So I wanted to make that [31]clear, as well.

THE COURT: Thank you.

All right. I'm going to overrule the objections for the following reasons:

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First, as to the battery, Mr. Welch pled guilty -- pled no contest actually to the crime which was alleged in the information -- where is it? I can't put my hands on it now.

MR. LINDER: Your Honor, what are you looking for exactly?

THE COURT: I'm looking for the information in the battery case.

MR. LINDER: I can hand it up to the Court if you would like.

THE COURT: I had it, I just don't know what I did with it.

Thank you.

MR. LINDER: You're welcome.

THE COURT: Here it is. I found it.

The information in the battery case was for felony battery, paren great bodily harm, permanent disability or permanent disfigurement, end paren, is what the captioned charge was. And then in the body of the information. it alleges that "the Defendant did unlawfully, actually and intentionally touch or strike John Andrew against his will and caused great bodily harm, pei manent disability or permanent [32]disfigurement, to wit, by striking John Andrew on the head with the hammer or other blunt object."

So that was what the charge was. He pled no contest to that charge. Now, it's true that the plea colloquy, for whatever reason, there was no factual predicate addressed at the time of the plea. As Mr. Linder points out, his lawyer -- and I'm not sure that this -- I'm not sure how much that it helps or hurts -- said that the head had healed at one point in that plea colloquy or in the discussion before the Court, but even without that, excluding that, he pled no contest to what was alleged here. There's nothing in the plea colloquy that suggests anything other than what's alleged here, and I believe that that is sufficient to find that he was found guilty of doing what's alleged in the information. There's nothing to indicate to the contrary.

And certainly striking someone against his will and causing great bodily harm, permanent disability or permanent disfigurement by being struck over the head with a hammer or other blunt object is -- I think meets the standards for a violent felony.

Now, as to the robbery, I want to go back further than the Pitts opinion that came out a few weeks ago and start with *United States versus Wilkes*, 464 F.3d 1240, decided by the Eleventh Circuit in 2006. It's not directly on point, but I think it gives some guidance.

[33]In that case, the Defendant was -- it was again a question of whether he should be considered an armed career criminal. The issue in the case really was whether or not his -- the Defendant's convictions as a youthful offender should be counted as convictions under the armed career criminal statute. But one of the convictions which

was in question was strong-arm robbery, which is exactly what is alleged in this case. The judgment is strong-arm robbery in the case to which the Defendant is lodging an objection, and it was a Florida conviction for strong-arm robbery, and that counted as an armed career criminal enhancement.

Again, it wasn't directly on point, because the real issue was whether or not the youthful offender conviction counted.

Then we go to *United States versus Wilkerson*, W-i-l-k-e-r-s-o-n, 286 F.3d 1324, Eleventh Circuit in 2002. Now, in this case, the Defendant was -- had a prior conviction for conspiracy to commit robbery. The question was whether conspiracy to commit robbery was a violent felony. And the Court in that case held it was, and the Court indicated that "Florida law defines the offense of robbery as the taking of another's property by the use of force, violence, assault or putting in fear. Thus defined, robbery clearly constitutes a violent felony within the meaning of Section 924(e)(2)(B)," citing *United States versus Jackson*, 57 F.3d 1012, Eleventh [34]Circuit, 1995.

The Court in the Wilkerson opinion says, "and because robbery, as defined by Florida law, involves conduct that presents a serious potential risk of physical injury to another, we conclude that conspiracy that has as its object the offense of robbery likewise presents such a risk."

All right. That was Wilkerson in 2002.

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Earlier this year, February, the Eleventh Circuit decided *United States versus Whitson*, W-h-i-t-s-o-n, 597 F.3d 1218. In *Whitson*, the Eleventh Circuit retracted or retreated from its position that conspiracy to commit a robbery is a violent felony after Begay and James. However, in doing that they said, "we stand by Wilkerson as far as it concerns serious risk of physical injury, and its reasoning remains sound even after Begay."

So even though they reversed themselves in terms of under the new Supreme Court decisions as to what violent felonies are, saying conspiracy to commit a robbery is not a violent felony, they said the reasoning of Wilkerson about the robbery itself and what it constitutes in terms of posing a serious risk of physical injury, that's sound and that still applies. Now, this was decided before *Johnson*, a month before *Johnson*, but I think that I need to, you know, follow that dictate.

And then we get to the two post-*Johnson* cases that I [35]came across, *United States versus Oner*, O-n-e-r, 210 -- excuse me, 2010 Westlaw 2381055, decided on June 15th of this year. It's an unpublished opinion. And, again, it's not completely on point, but the question was whether armed robbery was a violent felony post-*Johnson*. And this is not an armed robbery, but -- and they said armed robbery was. And in so doing, they said that the statute requires the taking of another's money or property by the use of force, violence, assault, or putting in fear while carrying a firearm or other deadly weapon. And this -- the *Oner* case really doesn't help us, because the gun in and of itself was sufficient to raise it to the whatever level you needed

to, the fear of having a gun. So it's just a post-*Johnson* case. But I think the *Pitts* case is the one that, although it's not binding, I think that supports the conclusion that robbery still in the Eleventh Circuit would be considered a violent felony.

And as Mr. Linder pointed out, it was interpreting a California statute, but it also had the term "by means of force or fear," and that's the "or fear" is what the Defendant is basing its main argument on, that because it could be by fear, and the fear does not necessarily rise to the level of violence that is required under the *Johnson* opinion, that it doesn't qualify. And the Court said, "a violent felony includes the threatened use of physical force against the person of another. We cannot think of any logical way for a [36]defendant to place fear in the victim of a robbery other than by threatening physical harm. We cannot think of any other logical way for a defendant to place fear in the victim of a robbery other than by threatening physical harm."

So it seems to me they're saying fear is being -- by definition, is being imposed by a threat of harm. And I think if you read the *Pitts* opinion, again, which is not binding, in conjunction with the *Wilkerson*, the portion of *Wilkerson* that's still, according to the Eleventh Circuit as recently as February, is still good law, that robbery is a crime of violence, and therefore I believe the -- both of the challenged convictions do qualify, and therefore the Defendant is an armed career criminal under the guidelines.

MR. LINDER: Your Honor, may I ask, because it will be an appeal, may I ask two points of clarification?

THE COURT: Yes.

MR. LINDER: As to the battery statute, are you deciding under the categorical or the modified categorical approach that it's a crime of violence?

THE COURT: Well, I agree with you that it's — under both. I think it's a crime of violence under both approaches.

MR. LINDER: And then as to the robbery statute. The reason I'm asking is your reference to *Wilkerson* — *Whitson*, those are cases that decided that robbery was a crime of violence under the so-called residual clause, and I believe [37]it's 924(e)(2)(B)(ii), whereas *Pitts* decides that it's a crime of violence under the elements clause of 924(e)(2)(B)(i), and I just want to be clear for the record which clause —

THE COURT: I think it meets both tests, but if it doesn't meet the -- the elements test, I think it meets the residual test.

MR. LINDER: Thank you, Your Honor. I just wanted to be clear for the record. Thank you.

THE COURT: So anything else on those issues?

MR. BIRCH: Not on those issues, Your Honor.

THE COURT: All right. Are there any other issues regarding the presentence report?

MR. BIRCH: No, Your Honor.

MR. LINDER: No, Your Honor.

THE COURT: All right. Then I'll adopt the findings of the presentence report as the -- the modified findings as the findings of the Court.

All right. Mr. Linder, what's your position regarding sentencing?

MR. LINDER: Your Honor, I believe the correct guideline range now is 180 to 210 months' imprisonment; is that correct?

PROBATION OFFICER: Yes, correct.

MR. LINDER: The Government would recommend a sentence at the low end of that range, the 180 months, Your [38]Honor.

THE COURT: Mr. Birch?

MR. BIRCH: Your Honor, I would certainly agree that 180 months is sufficient but not more than necessary in this case and would ask that the Court impose that sentence.

***

[39]THE COURT: All right. The Court has considered the statements of all the parties, the presentence report which contains the advisory guidelines, as well as the statutory factors set forth in 18 U.S.C., Section 3553(a) (1) through (7).

It is the finding of the Court the Defendant is not able to pay a fine.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the Defendant, Gregory Welch, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 180 months. Upon release from imprisonment, the Defendant shall be placed on supervised [40]release for a term of three years.

Within 72 hours of his release, the Defendant shall report in person to the probation office in the district where he's released.

While on supervised release, the Defendant shall not commit any crimes, he shall be prohibited from possessing a firearm or other dangerous devices, and he shall not possess a controlled substance.

He shall cooperate in the collection of DNA, shall comply with the standard conditions of supervised release that have been adopted by this court, as well as the following special conditions:

Surrendering to Immigration for removal after imprisonment, substance abuse treatment and permissible search, as noted in Part G of the presentence report.

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The Defendant shall also immediately pay to the United States a special assessment of $100.

Total sentence is 180 months' imprisonment, three years' supervised release and a $100 special assessment.

Now that sentence has been imposed, does the Defendant or his counsel object to the Court's findings of fact or the manner in which sentence was pronounced?

MR. BIRCH: Yes, Your Honor. We would renew all of our objections to the Armed Career Criminal Act being applied to Mr. Welch, as well as the Apprendi objection I made earlier [41]and would object to the Court's findings of fact to the contrary of our position as previously stated, and we just readopt everything.

THE COURT: All right. Thank you.

****

APPENDIX M — WELCH'S SUPPLEMENTAL OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, FILED SEPTEMBER 16, 2010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-60212-CR-MARRA/VITUNAC

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREGORY WELCH,

Defendant.

SUPPLEMENTAL OBJECTION TO PRESENTENCE INVESTIGATION REPORT

Defendant, Gregory Welch, Campos, by and through his undersigned counsel, submits the following supplemental objection to the presentence investigation report (PSI).

As to paragraph 21, Defendant maintains that pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), *Blakely v. Washington*, 524 U.S. 296, 124 S. Ct. 2531 (2004), and *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005), the armed career criminal enhancement should not apply as this aggravating factor is based upon convictions that were not charged in the

indictment. *But see Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219 (1998). Defendant submits it is a violation of the Fifth and Sixth amendments for this enhancement to apply without being charged in the indictment, and determined by a jury.

KATHLEEN M. WILLIAMS
FEDERAL PUBLIC DEFENDER

/s/ Peter Birch
Peter Birch
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APPENDIX N — WELCH'S NOTICE OF FILING AND SELECT ATTACHMENTS, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, ENTERED SEPTEMBER 16, 2010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-60212-CR-MARRA/VITUNAC

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREGORY WELCH,

Defendant.

NOTICE OF FILING

Defendant, Gregory Welch, files the following in support of his objections to the Presentence Investigation Report:

1. Information for Felony Battery, Case No. 03-17694-CF 10.

2. Judgment for Felony Battery, Case No. 03-17694-CF 10.

3. Transcript of Plea Colloquy in Case No. 03-17694 CF 10.

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Respectfully submitted,

KATHLEEN M. WILLIAMS
FEDERAL PUBLIC DEFENDER

s/ Peter Birch
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***

Appendix N

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

THE STATE OF FLORIDA

vs.

GREGORY WELCH

INFORMATION FOR FELONY BATTERY (GREAT BODILY HARM, PERMANENT DISABILITY OR PERMANENT DISFIGUREMENT)

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, charges that GREGORY WELCH on the 18th day of May, A.D. 2003, in the County and State aforesaid, did unlawfully actually and intentionally touch or strike John Andrew against his will and caused great bodily harm, permanent disability or permanent disfigurement, to-wit: by striking John Andrew on the head with a hammer or other blunt object, contrary to F.S. 784.041, (L6),

***

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17th Judicial Circuit in and for Broward County

DIVISION: CRIMINAL **DIVISION:** FP

JUDGMENT

THE STATE OF FLORIDA VS. CASE NUMBER

DEFENDANT GREGORY WELCH 03-17694 CF 10
☐ Probation Violator

State Attorney Alan John-Baptiste
Court Reporter Shelly Flaherty

The Defendant, Gregory Welch being personally before this Court represented by Michael Gelety, his attorney of record, and having:

(Check applicable provision)
☐ Been tried and found guilty of the following crime(s)

☐ Entered a plea of guilty to the following crime(s)

☑ Entered a plea of nolo contendre to the following crime(s)

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COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE OF CRIME	ADD'L MONIES IMPOSED
1	Fel Battery	784041	37	_____

and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

The Defendant is hereby ordered to pay a sum of Fifty Dollars ($50.00) pursuant to F.S. 960.20 (Crimes Comp. Trust Fund). The Defendant is further ordered to pay the sum of Five Dollars ($5.00) as court cost pursuant to F.S 943.25(4). Fines imposed as part of a sentence pursuant to F.S. 777.083 are to be recorded on the Sentence page(s). *(Check if applicable)*

Stayed & Withheld Imposition of Sentence	( ) The Court hereby stays and withholds the imposition of sentence as to count(s) _____ and places the Defendant on probation for a period of _____ under the supervision of the Department of Corrections (conditions of probation set forth in a separate order)
Sentence Deferred Until Later Date	( ) The Court hereby defers imposition of sentence until _____ (Date)

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(✓) Pay $200.00 Trust Fund pursuant to F.S. 27.3455

Count(s) I: 364 (DAYS) MONTHS BROWARD COUNTY JAIL W/CREDIT 0 DAYS TIME SERVED.

The Defendant in open court was advised of his right to appeal from this Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The Defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing indigence.

/s/_____
JUDGE

I hereby certify that a true and correct copy of the above and foregoing was served on the State Attorney by: (✓) hand delivery ( ) U.S. mail and to the Defense Attorney by (✓) hand delivery ( ) U.S. mail this 26 day of Sept, 2005.

/s/_____
Deputy Clerk

Appendix N

[1]IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.: 03 17694-CFlO

STATE OF FLORIDA

vs.

GREGORY WELCH,

Defendant.

SEPTEMBER 26, 2005

PLEA DIRECTLY FOLLOWING *VOIR DIRE*

The above-entitled cause came on for hearing at the Broward County Courthouse, Ft. Lauderdale, Florida, on the 26th day of September, 2005, before Judge Newman, commencing at 1:30 p.m.

[2](THE FOLLOWING PROCEEDINGS WERE HAD FOLLOWING *VOIR DIRE*:)

MR. GILETTE: Judge, we were two weeks away from having this resolved. What happened was, we came up with a resolution. It would be a plea and a straight 364 days in county jail.

Mr. Andrews, the victim, is here. Apparently he approved of that. There is a restitution matter of $350, which was a deductible because he went to the hospital.

As we were working over the lunch hour, what we said, "We'll pay $350 restitution and do the 364 and the case will be finished." The defendant's paycheck will be in within the next week or two. It's supposed to be over a thousand bucks. Then he will be able to pay the $350. His mom is tapped out and his wife because she is dealing with the kids. Let me be more blunt: I will be happy to pay it. I can't technically. A lawyer can't go on the hook for somebody. That is an ethical violation. I can't do any end-runs. It is just not ethical. I'm not going to violate any candor of ethics. They can pay in a week or two. They can bring the money to me. I can write a trust account check. But the problem is, is that the prosecutor wanted the money paid today. I can't pay it today.

THE COURT: Well.

MR. BAPTISTE: Judge, what happened -- the concern of [3]the State Attorney's Office is the money that is owed to the victim. I tried to get a hold of my supervisor to explain what the situation is.

THE COURT: What I could do, if the victim has no objection, if it can't be paid today, I can sentence him to a longer time in the state pen with the understanding that within a certain date — we'll pick the date—two weeks from today he is to pay the victim in the amount of $350. When he does, I will mitigate the sentence back to 364 days plus restitution, which has been paid.

MR. GILETTE: Of course.

THE COURT: That will protect everybody. If he doesn't do it, he is looking at five years in jail. Do you understand what I'm saying?

MS. WELCH (WIFE) : Yeah.

THE COURT: I will sentence him to five years. I will mitigate and you have to give me a date when it will be paid. As long as I know it has been paid, I will mitigate it back to 364 in the state pen -- I mean the county jail.

MR. GILETTE: We can do the plea now and do a voluntary surrender.

MR. BAPTISTE: I want to make sure the victim agrees. State your name for the record.

MR. ANDREW: John Andrew.

THE COURT: I am willing to accept the plea and the [4]fine -- I mean the reimbursement of $350. It cannot be paid today. It is like I'm releasing him for two weeks. I am sentencing him to a much heavier sentence today to be mitigated upon payment to you. We'll pick a date when the payment is due. It's due that day or before.

MR. BAPTISTE: He would start his sentence today, correct?

THE COURT: He could start the sentence today, but I want him kept here in county.

MR. GILETTE: It will be a straight county sentence.

THE COURT: I am sentencing him to more time.

MR. GILETTE: I have a great idea. We have a jury.

We could recess early where they can try to get the bucks together today.

THE COURT: You indicated they couldn't do it.

MR. GILETTE: If he goes in, it will be harder yet. Hold on a second.

MR. BAPTISTE: We're going to have to go forward. The victim just represented to me that the defendant looked at him and told him, "It's not over."

Based on that, there is no deal on the table. The victim just expressed to me he is afraid for his life.

THE COURT: Well, I can't get involved in that. Do we have a plea worked out or we don't? Do you want to say something on the record?

[5]MR. ANDREWS: He told me "It's not over", so I don't know what that means.

MR. BAPTISTE: There is no offer on the table. I'm sorry.

THE COURT: The State is withdrawing the offer because of something that was said to the victim. That's all I know. So there is no offer on the table?

MR. BAPTISTE: No, Your Honor.

MR. GILETTE: Judge, I'm trying to do eight things at once. What happened to the deal?

THE COURT: According to the victim. the defendant said to him, "It's not over."

MRS. WELCH (DEFENDANT'S MOTHER): No, he didn't.

MS. WELCH (DEFENDANT'S WIFE): No, he didn't.

MR. GILETTE: We're trying to get it over with. Was that interpreted as a threat?

THE COURT: Yes.

MR. BAPTISTE: Judge, if I can have a moment to speak to the victim.

MR. GILETTE: I've handed the Court a copy of the plea form. He has filled it out. Let me make sure it is the same form. I got it out of Judge Murphy's courtroom.

Judge, here is what is going on over the continuing saga: Mr. Andrew -- in fact, I will hand it to the prosecutor. I'm handing him $350 in cash.

[6]MR. BAPTISTE: I am now handing it to the victim.

MR. GILETTE: I have received a check from the defendant's mother for $100. Based on that check, now that I have been paid, I was lucky enough to have $100 with me. At his request, I have the check here. I gave him the 100 bucks so we don't have any ethical problems.

The $350, which has been handed to Mr. Andrew and acknowledged in court, did you get the $350?

MR. ANDREW: Yes, sir.

MR. GILETTE: That's the full and final restitution. We all know what we're trying to do here -- this resolves everything.

Based on that, at this point the defendant is going to withdraw his plea of not guilty and he has filled out his form. He'll plead no contest. He is going to get adjudicated guilty to the felony battery, which is a third degree felony, $5,000 fine, and sentenced to 364 days; no credit for time served because that's how the negotiation is.

Based upon that, we are confident he will do — well, he will get more credit against the one year than he would for the 85 percent in the prison system. This is in his best interest. His wife is here. His mom is here. We had a

tearful conversation over the week or so. They understand the risks.

[7]THE BAILIFF: Would you like me to put the jury in the jury room until you finish? They're coming back from lunch.

THE COURT: Sure. Give him a second to get the jury in there.

MR. GILETTE: Based on the fact he does have a considerable risk in this case, based on the fact he wanted to put this behind him and do the right thing, and based on the fact, interestingly enough, I can do a great job, the jury can come back with a compromised verdict and say, "We're not going to find you guilty of the felony, but of simple battery." He can still face the same 364. So we manipulated on the time served to make sure everybody is getting what they need to get. He has some time served in case. We're giving that up in order to negotiate on that. Mom is aware of this. He is aware of this. Nobody is happy to go to jail.

After taking a deep breath and getting to where we are, I think the emotions can calm down on both sides. I spoke to everybody and said no more contact or dirty looks on either side. It happened two years ago. The head has healed.

MR. BAPTISTE: Part of the terms and continuing conditions is that the defendant have no contact with the victim in this case.

[8]Judge, I have some case law. David Fulcher versus State of Florida, 875 So. 2nd 647, this case basically stands for the proposition that the defendant has to affirmatively waive his right for credit time served.

I want to make sure the defendant understands this plea offer on the record. He is to waive any credit for time served.

THE COURT: I will ask him that when he is under oath. Will you swear him in, please?

DEFENDANT GREGORY WELCH,

HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

THE COURT: Tell the Court your name.

THE DEFENDANT: Gregory Welch.

THE COURT: Are you over the age of 21?

THE DEFENDANT: Yes.

THE COURT: How far did you go in school?

THE DEFENDANT: I have my GED and one year of junior college.

THE COURT: Have you had an opportunity to discuss this case with your attorney?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with the services of your attorney?

THE DEFENDANT: One-hundred percent.

THE COURT: Did he go over the facts of the case, [9]the charges against you, any defenses you may have, and certain rights you give up when you enter this plea of no contest?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone forced you or threatened you to enter this plea?

THE DEFENDANT: No.

THE COURT: Has anyone promised you anything other than what you have heard here in court?

THE DEFENDANT: No.

THE COURT: Are you now taking or under the influence of any drugs or alcohol or medicine of any kind?

THE DEFENDANT: No.

THE COURT: You know exactly what you're doing — entering a no-contest plea to this charge?

THE DEFENDANT: Yes sir.

THE COURT: Also, you understand you are giving up any rights you have for time served. You will have to serve 364 days in the Broward County Jail. You understand that?

THE DEFENDANT: Yes.

THE COURT: You will surrender your time-served days. You are giving them up. You understand that?

THE DEFENDANT: (NODDING).

MR. BAPTISTE: I wanted to make sure he says "yes" [10]so the court reporter can get it.

MR. GILETTE: He hesitated. He is not giving up credits he will earn — just what he has done.

THE COURT: Right.

MR. GILETTE: We're hoping he will be able to earn some time.

THE COURT: That we have no control over. I have to ask: Is this going to affect anything you have with immigration or naturalization? If he serves it, it doesn't matter whether it applies or not.

I want to go over some rights you give up. If there is anything you don't understand, stop me and confer with your attorney.

If you did not enter this plea, you have the right to be tried by the jury or judge; the right to remain silent during the trial. The attorney will cross-examine any of the state witnesses and you can call witnesses on your own behalf, and the State would have the burden of proving your guilt beyond a reasonable doubt. And if you are convicted at the time of trial, you can appeal to the Court.

You understand, by entering this plea, you are giving up these rights?

MR. BAPTISTE: How many days does he have?

THE CLERK: 281 days.

[11]MR. BAPTISTE: Okay.

THE COURT: You are doing this of your own free will and you feel this is in your best interest?

THE DEFENDANT: Yes.

THE COURT: The Court finds the defendant, Gregory Welch, has freely and voluntarily entered this plea, understands the charges against him; is competent, both physically and mentally; and is certainly represented by competent counsel.

In the matter of State of Florida versus Gregory Welch, 03-17694-CF10, based upon this plea, the Court will adjudicate him guilty; sentence him to 364 Broward County Jail; and he's giving up any credit for time served

in reference to this particular matter. And I hope he does his time, gets out. Also he needs to keep away and not have any contact with the victim in this case. That is physical contact, phone contact — anything else anyone can think of. No contact whatsoever with the victim in this case.

Also there was $350 restitution paid to the victim in this matter. That brings this matter to a conclusion. He will be fingerprinted.

THE CLERK: You have to impose court costs. You can convert them to a civil lien.

THE COURT: I will convert to a civil lien.

[12]MR. GILETTE: Thank you.

THE BAILIFF: we remand him into custody today?

THE COURT: Yes. Let's bring the jury in and excuse them.

APPENDIX O — WELCH'S SENTENCING MEMORANDUM AND SELECT ATTACHMENTS, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, FILED SEPTEMBER 15, 2010

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-60212-CR-MARRA/VITUNAC

UNITED STATES OF AMERICA,

Plaintiff,

v.

GREGORY WELCH,

Defendant.

DEFENDANT'S SENTENCING MEMORANDUM

Defendant, Gregory Welch, by and through his undersigned counsel, submits this sentencing memorandum. In doing so, Defendant states the following:

1. Defendant previously filed an objection to his classification in the presentence investigation report (PSI) as an armed career criminal. According to the Armed Career Criminal Act (herinafter, "ACCA"):

Appendix O

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such persons shall be fined under this title and imprisoned not less than fifteen years...

18 U.S.C. § 924(e)(1).

The ACCA defines a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year... that—
>
> > (i) has an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another...

18 U.S.C. § 924(e)(2)(B).

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The PSI relies on three prior convictions in recommending that this Court find that Defendant is subject to the enhanced penalties of the ACCA (PSI, ¶24). Of these three convictions, Defendant Welch submits that his robbery conviction in case number 96-5680 CF10 should not be considered a crime of violence.

2. In the aforementioned robbery, Defendant was charged by Information with "strong armed robbery" which involved the unlawful taking of property "by the use of force, violence, assault, or putting in fear... contrary to F.S. 812.13(1) and F.S. 812.13(2)(c)." (Appendix). As evidenced by the judgment (appendix) Defendant pled guilty to the crime charged. Nothing in either the Information or Judgment establishes the manner in which robbery was committed. The question, therefore, is whether this robbery constitutes a crime of violence.

3. Under 18 U.S.C. § 924(e)(2)(B)(i) a crime of violence is one that has an element the use, attempted use, or threatened use of physical force against the person of another. As stated by the Supreme Court: "We think it clear that in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force — that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, _ U.S. _, 130 S.Ct. 1265, 1271 (2010) (emphasis original). In *Montsdoca v. State*, 93 So. 157 (Fla. 1922) the Florida Supreme Court stated:

> It will be observed from a careful reading of the statute that there are several alternative

> ingredients of the crime of robbery. If property the subject of larceny is unlawfully taken from another either by force or violence or by assault or by putting in fear, the offense denounced by the statute is committed. The indictment charges these alternative ingredients of the offense conjunctively, and the charge should be sustained if either alternative ingredient is proven.

Id. at 85.

The Florida Supreme Court also noted that the degree of force is immaterial. *Id.* at 86. *See also Johnson v. State*, 612 So.2d 689, 690 (Fla. 1st DCA 1993). Accordingly, a robbery under Florida law can be committed without using *violent* force; as comtemplated by 18 U.S.C. § 924(e)(2)(B)(i).

3. There remains the question of whether Defendant's conviction for robbery can be classified as a violent felony under 18 U.S.C. § 924(e)(2)(B)(ii). Specifically, whether the robbery conviction at issue "involves conduct that presents a serious potential risk of physical injury to another." In this regard, the Supreme Court has stated that for a crime to constitute a violent felony under clause (ii), it must "involve purposeful, 'violent' and 'aggressive' conduct." *Begay v. United States*, 553 U.S. 136, 144-145, 128 S.Ct. 1581, 1586 (2008). As discussed above, under Florida law, robbery does not necessarily involve purposeful, violent, and aggressive conduct, and is therefore not a crime of violence under 18 U.S.C. § 924(e)(2)(B)(ii).

4. Based upon the foregoing, Defendant submits that the aforementioned robbery conviction is not a crime of violence under the ACCA and he should therefore not be classified as an armed career criminal.

KATHLEEN M. WILLIAMS
FEDERAL PUBLIC DEFENDER

s/ Peter Birch
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Appendix O

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, STATE OF FLORIDA

THE STATE OF FLORIDA,

v.

GREGORY WELCH

INFORMATION FOR
I. STRONG ARMED ROBBERY

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, charges that GREGORY WELCH on the 9th day of February, A.D. 1996, in the County and State aforesaid did unlawfully take from the person or custody of Joshua Cummings certain property of value, to-wit: jewelry, with the intent to permanently or temporarily deprive Joshua Cummings of a right to the property or a benefit therefrom, by the use of force, violence, assault, or putting the said Joshua Cummings in fear, contrary to F.S. 812.13(1) and F.S. 812.13(2)(c).(L-6)

MWM/sef/3/26/96

Appendix O

17th Judicial Circuit in and for Broward County

DIVISION: CRIMINAL **DIV: FA**

JUDGMENT

THE STATE OF FLORIDA VS. CASE NUMBER

DEFENDANT GREGORY WELCH 96-5680 CF 10

☐ Probation Violator
(Check if Applicable)

State Attorney Y. Conzo
Court Reporter B. Tanner

The Defendant, Gregory Welch being personally before this Court represented by S. Smith, his attorney of record, and having:

(Check applicable provision)

☐ Been tried and found guilty of the following crime(s).

☑ Entered a plea of guilty to the following crime(s).

☐ Entered a plea of nolo contendere to the following crime(s).

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COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE OF CRIME	ADD'L MONIES IMPOSED
1	Strong Arm Robbery	812.13(1)	2F	_____

and no cause having been shown why the Defendant should not be adjudicated guilty. IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

The Defendant is hereby ordered to pay a sum of Fifty Dollars ($50.00) pursuant to F.S. 960.20 (Crimes Comp. Trust Fund). The defendant is further ordered to pay the sum of Five Dollars ($5.00) as court costs pursuant to F.S. 948.25(4) (WAIVED).

(Check if applicable)

( ) The Defendant is further ordered to pay a fine in the sum of $ ___ pursuant to F.S. 775.0835. (This provision refers to the optional fine for the Crimes Compensation Trust Fund, and is not applicable unless checked and completed. Fines imposed as part of a sentence pursuant to F.S. 775.083 are to be recorded on the Sentence page(s).

( ) The Court hereby imposed additional court costs in the sum of $ _____

Appendix O

Imposition of Sentence Stayed & Withheld	( ) The Court hereby stays and withholds the imposition of sentence as to count(s) _____ and places the Defendant on probation for a period of _____ under the supervision of the Department of Corrections (conditions of probation set forth in a separate order.)
Sentence Deferred Until Later Date (check if Applicable)	( ) The Court hereby defers imposition of sentence until _____. (Date)
	( ) Pay $200.00 Trust Fund pursuant to F.S. 27.3455 (WAIVED).

The Defendant in Open Court was advised of his right to appeal from this Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The Defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigence.

COUNT(S) ___ : ___ DAYS BROWARD COUNTY

JAIL W/CREDIT FOR _____ DAYS TIMES SERVED

APPENDIX P — WELCH'S OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, ENTERED AUGUST 20, 2010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-60212-CR-MARRA/VITUNAC

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREGORY WELCH,

Defendant.

OBJECTIONS TO PRESENTENCE INVESTIGATION REPORT

Defendant, Gregory Welch, by and through his undersigned counsel, submits the following objections to the presentence investigation report (PSI).

1. As to paragraph 15, Defendant submits that felony battery, the offense of conviction in case no. 2003-CF-17694, and robbery, the offense of conviction in case no. 1996-CF-005680, should not be considered crimes of violence. Accordingly, as Defendant has only one prior conviction for a crime of violence, under U.S.S.G. § 2K2.1(a)(4) his base offense level is 20.

2. As to paragraph 21, Defendant objects to his classification as an armed career criminal in that the aforementioned convictions are not crimes of violence.

3. As to paragraph 24, based upon the foregoing, Defendant's total offense level is 17.

4. As to paragraphs 26 through 36, Defendant objects to the allegations contained therein. Furthermore, pursuant to *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254 2005), it is inappropriate to rely on the allegations in the arrest and booking sheet for the alleged circumstances of a prior offense. Therefore, the paragraphs purporting to provide the circumstances of the offenses contained within the aforementioned paragraphs should be removed from the PSI unless obtained from "the charging document, the terms of a plea agreement or transcript of colloquy between the judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Id.* at 26, 125 S.Ct. at 1263.

5. As to paragraph 86, Defendant submits that based upon an offense level 17, criminal history category VI, his advisory guideline range is 51 to 63 months imprisonment.

Appendix P

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APPENDIX Q — INDICTMENT, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, FILED AUGUST 20, 2009

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. _____

18 U.S.C. § 922(g)(1)
18 U.S.C. § 924(d)(1)

UNITED STATES OF AMERICA

vs.

GREGORY WELCH,

Defendant.

INDICTMENT

The Grand Jury charges that:

COUNT 1

On or about March 19, 2009, in Broward County, in the Southern District of Florida, the defendant,

GREGORY WELCH,

having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition in and

affecting interstate and foreign commerce, that is: (a) one (1) Lorcin, Model L380, .380-caliber automatic pistol, serial number 532504; (b) five (5) rounds of Winchester .380-caliber ammunition; and (c) one (1) round of Remington .380-caliber ammunition; any one of which being a violation; in violation of Title 18, United States Code, Section 922(g)(1).

FORFEITURE

A. The allegations of this Indictment are realleged and by this reference fully incorporated herein for the purpose of alleging forfeiture to the United States of America of property in which the defendant has an interest, pursuant to the provisions of Title 18, United States Code, Section 924(d)(1), as incorporated by Title 28, United States Code, Section 2461, and the procedures outlined at Title 21, United States Code, Section 853.

B. Upon the conviction of any violation of Title 18, United States Code, Section 922(g)(1), the defendant, **GREGORY WELCH,** shall forfeit to the United States of America any firearm and ammunition involved in or used in the commission of said violation.

All pursuant to, Title 18, United States Code, Section 924(d)(1); Title 28, United States Code, Section 2461; and Title 21, United States Code, Section 853.

A TRUE BILL

/s/_____
FOREPERSON

Appendix Q

/s/
JEFFREY H. SLOMAN
ACTING UNITED STATES ATTORNEY

/s/
JASON LINDER
ASSISTANT UNITED STATES ATTORNEY

Appendix Q

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. _____

UNITED STATES OF AMERICA

vs.

GREGORY WELCH,

Defendant.

CERTIFICATE OF TRIAL ATTORNEY*

Superseding Case Information:

New Defendant(s) Yes ☐ No ☐
Number of New Defendants ☐
Total number of counts ☐

Court Division: (Select One)

☐ Miami ☐ Key West ☒ FTL ☐ WPB ☐ FTP

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of

* Penalty Sheet(s) attached

probable witnesses and the legal complexities of the Indictment/Information attached hereto.

2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.

3. Interpreter: (Yes or No) No
   List Language and/or dialect _____

4. This case will take 2 days for the parties to try.

5. Please check appropriate category and type of offense listed below:

(Check only one)			(Check only one)	
I	0 to 5 days	☒	Petty	☐
II	6 to 10 days	☐	Minor	☐
III	11 to 20 days	☐	Misdem.	☐
IV	21 to 60 days	☐	Felony	☒
V	61 days and over	☐		

6. Has this case been previously filed in this District Court? (Yes or No) No

If yes:
Judge: _____ Case No. _____
(Attach copy of dispositive order)

Has a complaint been filed in this matter?
(Yes or No) No

Appendix Q

If yes:
Magistrate Case No. _____
Related Miscellaneous numbers: _____
Defendant(s) in federal custody as of _____
Defendant(s) in state custody as of _____
Rule 20 from the _____ District of _____

Is this a potential death penalty case?
(Yes or No) No

7. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003? ☐ Yes ☒ No

8. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to September 1, 2007? ☐ Yes ☒ No

/s/_____
JASON LINDER
ASSISTANT UNITED STATES ATTORNEY
Court No. A5501149

Appendix Q

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
PENALTY SHEET

Defendant's Name: GREGORY WELCH No.: _____

Count #1:
Felon in Possession of Firearm or Ammunition; in violation of 18 U.S.C. § 922(g)(1)

*Max Penalty: 10 years' imprisonment; 3 years supervised release; and $250,000 fine

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms or forfeitures that may be applicable.**

FEB - 9 2016

No. 15-6418

IN THE
Supreme Court of the United States

GREGORY WELCH,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I. Whether the District Court was in error when it denied relief on Petitioner's § 2255 motion to vacate, which alleged that a prior Florida conviction for "sudden snatching" did not qualify for ACCA enhancement pursuant to 18 U.S.C. § 924(e).

II. Whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), announced a new substantive rule of constitutional law that applies retroactively to cases that are on collateral review.

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INTRODUCTION

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court invalidated the residual clause of the Armed Career Criminal Act ("ACCA"), holding that "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life" violates the Fifth Amendment's prohibition on vague criminal laws. *Id.* at 2560. The issue in this case is whether that rule applies retroactively to defendants whose convictions became final before *Johnson*.

Plainly, it does. In *Teague v. Lane*, 489 U.S. 288 (1989), this Court "continued a long tradition of giving retroactive effect to constitutional rights that go beyond procedural guarantees." *Montgomery v. Louisiana*, No. 14-280, 2016 WL 280758, at *9 (U.S. Jan. 25, 2016). *Johnson* falls squarely within this category of constitutional rules that are substantive, not procedural, in nature and thus applies retroactively. *Johnson* held that the residual clause—under which a defendant's sentence was increased from a *maximum* of 10 years' imprisonment to a *minimum* of 15 years' imprisonment—is constitutionally invalid. In myriad cases, and most recently in *Montgomery*, this Court has recognized that when a law is held unconstitutional, it is "'void, and is as no law,'" and any penalty imposed pursuant to that law "is, by definition, unlawful." *Montgomery*, 2016 WL 280758, at *10 (quoting *Ex parte Siebold*, 100 U.S. 371 (1880)). *Johnson*'s constitutional holding is thus the clearest instance of a substantive rule: A determination that courts imposed punishment in excess of their lawful authority.

That conclusion accords not only with this Court's cases applying *Teague*, but also with the history of this Court's cases concerning the availability of the writ of habeas corpus. Indeed, this Court has recognized that habeas corpus relief is available to a petitioner whose punishment was imposed under an unconstitutional statute for at least 135 years. *See, e.g., Ex parte Siebold*, 100 U.S. 371 (1880). To deny relief in these circumstances now would undermine the very core of habeas corpus, which exists for the purpose of challenging ongoing confinement that has been imposed without legal authority.

Although *Teague* held that rules of procedure generally will not be applied retroactively, the rule announced in *Johnson*—that the residual clause is unconstitutionally vague and therefore cannot under any circumstances support an increase in a defendant's sentence—obviously is not procedural in nature, *i.e.*, a rule that "regulate[s] only the *manner of determining* the defendant's culpability." *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (emphasis in original). Neither "the use of impeccable factfinding procedures" nor "the use of flawless sentencing procedures" could legitimate an increased sentence under the residual clause. *Montgomery*, 2016 WL 280758, at *8 (quoting *United States v. U.S. Coin & Currency*, 401 U.S. 715, 724 (1971)). Under *Johnson*, a court lacks lawful authority to increase a sentence under the residual clause no matter what procedures it employs.

Because *Johnson* must be applied retroactively and Petitioner's sentence was increased under the unconstitutionally vague residual clause, the Eleventh

Circuit's judgment denying Petitioner a certificate of appealability should be reversed.

OPINIONS BELOW

The Eleventh Circuit's order below (JA 14a) is unreported. The district court's order adopting the Magistrate's Report and Recommendation (JA 25a) is unreported. The Magistrate Judge's Report and Recommendation (JA 28a) is unreported. The Eleventh Circuit's decision on direct appeal (JA 101a) is reported at 683 F.3d 1304. The trial court's judgment (JA 130a) is unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit entered its judgment on June 9, 2015. The petition for writ of certiorari was timely filed on September 2, 2015, and granted on January 8, 2016.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law."

28 U.S.C. § 2255(a) provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the

> sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

18 U.S.C. § 924(a)(2) provides: "Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both."

18 U.S.C. § 924(e) provides, in pertinent part:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years
>
> (2) As used in this subsection—
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, that–
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another;

STATEMENT

I. Petitioner's Conviction And Sentencing.

On June 18, 2010, Petitioner pled guilty to possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). JA 31a, 104a. The terms of Petitioner's original plea agreement specified that he could be sentenced up to the statutory maximum of 10 years' imprisonment that applies to violations of § 922(g)(1). JA 31a; 18 U.S.C. § 924(a)(2). The agreement did not provide for enhancement pursuant to ACCA, which would have subjected Petitioner to a mandatory minimum sentence of 15 years' imprisonment. 18 U.S.C. § 924(e).

At Petitioner's plea colloquy, the court explained to Petitioner, based on his unenhanced plea to possession of a firearm: "I can't sentence you to more than 10 years," because that would be "more than the law permits" and constitute "an illegal sentence." Transcript of Plea Colloquy 19, *United States v. Welch*, No. 09-cr-60212 (S.D. Fla. June 18, 2010), ECF No. 54.

Thereafter, Petitioner's presentence investigation report ("PSI") asserted that Petitioner had three prior convictions, each of which purportedly qualified as a "violent felony" under ACCA: a 2003 conviction for felony battery under Florida law and two 1996 convictions for robbery under Florida law. PSI at 7 (dated Aug. 6, 2010). Based on these prior convictions, the PSI concluded that Petitioner was subject to a mandatory minimum of 15 years' imprisonment. PSI at 20; 18 U.S.C. § 924(e). On advice of counsel, Petitioner accepted a new plea agreement that reflected a

mandatory minimum sentence of 15 years' imprisonment. JA 34a-35a, 121a. However, he reserved the right to challenge his qualification under ACCA. JA 104a, 142a.

At sentencing Petitioner argued that neither Florida battery nor Florida robbery qualified as a "violent felony" under ACCA. JA 145a-149a, 184a-186a.[1] The court rejected Petitioner's arguments and sentenced Petitioner to ACCA's mandatory minimum of 15 years' imprisonment. JA 152a-158a, 160a-161a.

II. Direct Appeal.

On appeal, Petitioner again challenged whether Florida robbery qualified as a "violent felony" under ACCA.

The Eleventh Circuit agreed that ACCA's elements clause, 18 U.S.C. § 924(e)(2)(B)(i), "arguably would not apply" to Florida robbery because Petitioner was

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[1] Petitioner argued that neither offense could qualify as a "violent felony" under ACCA's elements clause, 18 U.S.C. § 924(e)(2)(B)(i), based on this Court's decision in *Johnson (Curtis) v. United States*, 559 U.S. 133 (2010), which held that the elements clause requires "*violent* force," defined as "'extreme physical force'" that is "capable of causing physical pain or injury to another person." *Id.* at 140 (quoting *Black's Law Dictionary* 1188 (9th ed. 2009)); JA 148a, 184a-185a. With respect to Florida robbery, Petitioner argued—and the government conceded—that at the time of Petitioner's conviction, Florida law provided that "[t]he degree of force used [was] immaterial" to conviction for robbery. *Montsdoca v. State*, 93 So. 157, 159 (Fla. 1922); *see* JA 148a-149a, 184a-185a; *see also* JA 152a (government conceding that Florida robbery "doesn't have a requirement" as to "the degree of force involved").

convicted "at a time when the controlling Florida Supreme Court authority held that 'any degree of force' would convert larceny into a robbery," JA 114a-115a, 117a (quoting *McCloud v. State*, 335 So. 2d 257, 258-59 (Fla. 1976)). The court stated that it "need not" definitively hold that Florida robbery did not qualify under the elements clause, however, because the offense "suffices under the residual clause." JA 117a.

Specifically, according to the court, Florida robbery "involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii), because regardless of the amount of force used, robbery "ordinarily involves substantial risk of physical injury to the victim." JA 119a. The court posited that "[t]he victim's natural reaction is likely to be to try to hold on to his or her money or property, leading in many cases to serious injury." *Id.* As an example, the court described a case in which an "old woman died from the fall she took when the robber grabbed her purse in a parking lot." *Id.* Thus, the Eleventh Circuit reasoned, Florida robbery was "much like burglary, where if the victim perceives what is going on, a violent encounter is reasonably likely to ensue." *Id.* Accordingly, the court affirmed Petitioner's sentence under the residual clause. *Id.*

III. Petitioner's *Pro Se* Motion Under 28 U.S.C. § 2255.

On December 20, 2013, Petitioner filed a *pro se* motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, alleging, among other things, that he was "unconstitutionally sentenced as an armed career offender" and that his sentence "was enhanced

unconstitutionally to armed career offender status, in violation of his Fifth, Sixth, and Eighth Amendment rights." JA 83. Petitioner further alleged that ACCA's application to his robbery conviction "is ambiguous, vague, and was without any violence and[/]or physical force," and that therefore his sentence was "enhanced for a robbery that did not meet armed career offender requirements." JA 96a.

The district court denied Petitioner's § 2255 motion on December 19, 2014 and declined to issue a certificate of appealability. JA 25a-26a.

On January 30, 2015, Petitioner filed a *pro se* request for a certificate of appealability in the Eleventh Circuit. JA 17a-22a. In his request, Petitioner explained that *Johnson*—which had recently been calendared for reargument on the question of "[w]hether the residual clause in the Armed Career Criminal Act of 1984, 18 U. S. C. § 924(e)(2)(B)(ii), is unconstitutionally vague," *see* Docket Entry, *Johnson v. United States*, No. 13-7120 (U.S. Jan. 9, 2015)—was pending before this Court, *see* JA 20a. Petitioner also filed a motion to hold his case in abeyance pending this Court's resolution of *Johnson* and requested that the Eleventh Circuit grant relief from his sentence under ACCA in the event that *Johnson* was resolved favorably to him. *See* JA 15a-16a.

The Eleventh Circuit denied Petitioner's request for a certificate of appealability prior to this Court's decision in *Johnson*, without addressing Petitioner's motion. JA 14a.

IV. This Court's Decision In *Johnson*.

In *Johnson*, this Court invalidated ACCA's residual clause, holding that it violates the Fifth Amendment's prohibition on vague criminal laws. 135 S. Ct. at 2560.

The Court explained that "[t]wo features of the residual clause conspire to make it unconstitutionally vague." *Id.* at 2557. First, "the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime." *Id.* In particular, the clause "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements," yet offers no guidance as to how "one go[es] about deciding what kind of conduct the 'ordinary case' of a crime involves." *Id.* Using attempted burglary as an example, the Court explained that the residual clause "offers no reliable way" to determine whether the "ordinary" attempted burglary is likely to result in a "chase, and a violent encounter," or "the occupant's yelling 'Who's there?' from his window, and the burglar's running away." *Id.* at 2558 (internal quotation marks omitted).

Second, "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* The Court observed that the amount of risk required must be interpreted "in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives"—which are themselves "'far from clear in respect to the degree of risk each poses.'" *Id.* (quoting *Begay v. United States*, 553 U.S. 137, 143 (2008)); *see also id.* ("Does the ordinary burglar invade an occupied home by night or an unoccupied home by day? Does the

typical extortionist threaten his victim in person with the use of force, or does he threaten his victim by mail with the revelation of embarrassing personal information?").

After reviewing its own decisions interpreting the residual clause and decisions in the lower courts, the Court observed that "the experience of the federal courts leaves no doubt about the unavoidable uncertainty and arbitrariness of adjudication under the residual clause." *Id.* at 2562. On these bases, the Court held "that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." *Id.* at 2563.

V Post-*Johnson* Developments And Petition To This Court.

After this Court's decision in *Johnson*, Petitioner filed a *pro se* motion for leave to seek reconsideration of the denial of his § 2255 motion in the Eleventh Circuit, which the court denied as untimely. *See* JA 12a-13a.[2]

Following *Johnson*, a prevailing (and arguably unanimous) view developed among the circuits that *Johnson* announced a substantive rule of criminal law that applies retroactively to prisoners (like Petitioner)

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[2] Petitioner separately moved for the Eleventh Circuit to recall its mandate in his direct appeal on the ground that the residual clause, upon which it had relied, was held unconstitutional in *Johnson*. *See* Motion to Recall Mandate, *United States v. Welch*, No. 10-14649 (11th Cir. Sept. 2, 2015). The Eleventh Circuit denied that motion on December 1, 2015. Order, *United States v. Welch*, No. 10-14649 (11th Cir. Dec. 1, 2015).

who are pursuing their first motion under 28 U.S.C. § 2255.[3] Indeed, following its denial of Petitioner's request for a certificate of appealability, the Eleventh Circuit has recognized that *Johnson* announced a "new substantive rule" that applies retroactively to cases like Petitioner's, which arise in the context of a first § 2255 motion. *In re Rivero*, 797 F.3d 986, 991 (11th Cir. 2015).

The circuits sharply split, however, as to whether *Johnson* has been "made retroactive" by this Court, such that it would apply in the case of a second or successive motion under § 2255. *See* 28 U.S.C. § 2255(h)(2).[4] As a result, prisoners on one side of the

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[3] *See In re Watkins*, No. 15-5038, __ F.3d __, 2015 WL 9241176, at *6 (6th Cir. Dec. 17, 2015) ("*Johnson* announced a substantive rule that prohibits the imposition of ACCA's 15-year mandatory minimum sentencing provision on defendants whose status as armed career criminals depends on application of the unconstitutionally vague residual clause"); *Price v. United States*, 795 F.3d 731, 732 (7th Cir. 2015) ("We now conclude . . . that *Johnson* announces a new substantive rule of constitutional law that the Supreme Court has categorically made retroactive to final convictions."); *In re Rivero*, 797 F.3d 986, 991 (11th Cir. 2015) (where a petitioner is "seeking a first collateral review of his sentence, the new substantive rule from *Johnson* would apply retroactively"). In *In re Williams*, 806 F.3d 322 (5th Cir. 2015), the Fifth Circuit's reasoning suggested that *Johnson* might not be retroactive to cases on collateral review; however, as described further below, that decision took place in the context of a successive § 2255 motion and it is not clear that the Fifth Circuit would depart from its sister circuits' unanimous view that *Johnson* is retroactive to an initial motion. *See infra* 22-24 & n.8.

[4] The First, Second, Sixth, Seventh, Eighth, and Ninth Circuits have all authorized petitioners to file successive § 2255 motions

split are already being resentenced or released under *Johnson*, while those on the other are being required to carry out their unconstitutionally-imposed sentences.

These prisoners face an impending statute of limitations to file their claims for relief, which expires on June 26, 2016 (one year from the date of this Court's decision in *Johnson*). *See* 28 U.S.C. § 2255(f)(3) (statute of limitations runs from "the date on which the right asserted was initially recognized by the Supreme Court"); *Dodd v. United States*, 545 U.S. 353, 357 (2005).

Following the Eleventh Circuit's denial of leave to seek reconsideration, Petitioner filed a *pro se* petition for certiorari in this Court, which was granted on January 8, 2016. This Court's resolution of Petitioner's case will necessarily resolve the split affecting second or successive motions. *See Tyler v. Cain*, 533 U.S. 656, 668 (2001) (O'Connor, J., concurring) ("The clearest instance, of course, in which we can be said to have 'made' a new rule retroactive is where we expressly have held the new rule to be retroactive in a case on collateral review and applied the rule to that case.").

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based on *Johnson*. *See Pakala v. United States*, 804 F.3d 139 (1st Cir. 2015); Order, *Rivera v. United States*, No. 13-4654 (2d Cir. Oct. 5, 2015), ECF No. 44; *Watkins*, 2015 WL 9241176, at *6-7 (6th Cir.); *Price*, 795 F.3d at 734-35 (7th Cir.); *Woods v. United States*, 805 F.3d 1152, 1154 (8th Cir. 2015); Order, *United States v. Striet*, No. 15-72506 (9th Cir. Aug. 25, 2015), ECF No. 2. The Fifth, Tenth, and Eleventh Circuits have denied such authorization. *See Williams*, 806 F.3d at 327 (5th Cir.); *In re Gieswein*, 802 F.3d 1143, 1148-49 (10th Cir. 2015); *Rivero*, 797 F.3d at 992 (11th Cir.).

SUMMARY OF ARGUMENT

The rule announced in *Johnson*—that a defendant cannot constitutionally be sentenced to 15 years to life under the residual clause because it is unconstitutionally vague—is a substantive rule that applies retroactively on collateral review.

Under *Teague v. Lane*, 489 U.S. 288 (1989), and subsequent decisions, "courts must give retroactive effect to new substantive rules of constitutional law," while new rules of criminal procedure are generally not applied retroactively. *Montgomery v. Louisiana*, No. 14-280, 2016 WL 280758, at *5 (U.S. Jan. 25, 2016); *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004). The rule announced in *Johnson* is plainly substantive, not procedural, because it directly alters the class of persons subject to punishment under ACCA. *Schriro*, 542 U.S. at 353. *Johnson* held that the Constitution does not permit a court to sentence a defendant to 15 years to life on the basis that he engaged in "conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). As this Court has long recognized, "'[a]n unconstitutional law is void, and is as no law,'" and it follows that "[a] penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional." *Montgomery*, 2016 WL 280758, at *10 (quoting *Ex parte Siebold*, 100 U.S. 371, 376 (1880)).

Johnson thus possesses the paradigmatic feature of substantive rules: A defendant whose sentence was increased under the residual clause "faces a punishment that the law cannot impose upon him." *Schriro*, 542

U.S. at 352. Application of the residual clause increased a defendant's sentence from a *maximum* of 10 years' imprisonment to a *minimum* of 15 years' imprisonment. Thus, every defendant whose qualification under ACCA depended on the residual clause faces *at least* five additional years of confinement that were not authorized by law. To deny retroactivity in these circumstances "would be inconsistent with the doctrinal underpinnings of habeas review." *Bousley v. United States*, 523 U.S. 614, 621 (1998).

The rule of *Johnson*—that the residual clause is void for vagueness and therefore cannot, under any circumstances, support an increase in a defendant's maximum sentence—cannot fairly be considered procedural in nature, *i.e.*, as "regulat[ing] only the *manner of determining* the defendant's culpability." *Schriro*, 542 U.S. at 353 (emphasis in original). Under *Johnson*, a court may not increase a sentence under the residual clause no matter what procedures it employs.

That *Johnson* must be applied retroactively is also confirmed by the origins of *Teague*'s distinction between substantive and procedural rules, and by the history of the writ of habeas corpus. As this Court has explained, "[t]he category of substantive rules discussed in *Teague* originated in Justice Harlan's approach to retroactivity" in *Mackey v. United States*, 401 U.S. 667 (1971), and *Desist v. United States*, 394 U.S. 244 (1969). *Montgomery*, 2016 WL 280758, at *8. Under that approach, Petitioner's *Johnson* claim—in which he "attack[s] the constitutionality of the federal or state statute" that was believed to authorize his

now-final conviction and punishment—is the paradigmatic example of a claim for which "the writ has historically been available." *Mackey*, 401 U.S. at 684, 692-93 (Harlan, J., concurring in part and dissenting in part) (citations omitted); *see Desist*, 394 U.S. at 261 & n.2 (Harlan, J., dissenting).

As Petitioner explained in his petition for certiorari to this Court—and the government did not contest in its certiorari briefing—Petitioner qualified under ACCA only by virtue of the residual clause. Because *Johnson* is retroactive, the district court's judgment is in error and the Eleventh Circuit should be reversed.

ARGUMENT

I. *Johnson* Is Retroactive To Cases On Collateral Review.

A. Under *Teague*, Substantive Rules Must Be Applied Retroactively.

Under this Court's framework for retroactivity, set forth in *Teague* and subsequent cases, the retroactivity of a given rule depends on whether it is substantive or procedural in nature. *Schriro*, 542 U.S. at 351-53. "*Teague* continued a long tradition of giving retroactive effect to constitutional rights that go beyond procedural guarantees. *Montgomery*, 2016 WL 280758, at *9. Therefore, under *Teague*, "courts must give retroactive effect to new substantive rules of constitutional law." *Id.* at *5; *see also id.* at *6 ("*Teague* requires the retroactive application of new substantive rules in federal habeas proceedings."). Procedural rules, on the other hand, "generally do not

apply retroactively." *Schriro*, 542 U.S. at 352; *Montgomery*, 2016 WL 280758, at *5.[5]

The rationale for *Teague*'s exception to retroactivity in the case of procedural rules is straightforward. "[A] procedural rule 'regulate[s] only the *manner of determining* the defendant's culpability.'" *Montgomery*, 2016 WL 280758, at *11 (quoting *Schriro*, 542 U.S. at 353) (emphasis in original). Examples of such rules include those governing the admissibility of evidence, *see, e.g.*, *Whorton v. Bockting*, 549 U.S. 406 (2007); the makeup of a jury, *see, e.g.*, *Teague*, 489 U.S. 288; permissible jury instructions, *see, e.g.*, *Beard v. Banks*, 542 U.S. 406, 408 (2004); *Saffle v. Parks*, 494 U.S. 484 (1990); and what representations may be made to a jury, *see, e.g.*, *O'Dell v. Netherland*, 521 U.S. 151, 153 (1997); *Sawyer v. Smith*, 497 U.S. 227, 229 (1990). "Even where procedural error has infected a trial, the resulting conviction or sentence may still be accurate; and, by extension, the defendant's continued confinement may still be lawful." *Montgomery*, 2016 WL 280758, at *8. Therefore, the recognition of a new procedural rule "merely raise[s] the possibility that someone convicted with use of [an] invalidated procedure might have been acquitted otherwise" or "faces a punishment that the law cannot impose upon him." *Schriro*, 542 U.S. at 352. As a result of "this

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[5] Although *Teague* itself framed the retroactivity of substantive rules as an exception, this Court has since explained numerous times that *Teague*'s bar is the exception and that substantive rules are simply "not subject to" *Teague*. *Montgomery*, 2016 WL 280758, at *5 (quoting *Schriro*, 542 U.S. at 352 n.4); *Beard v. Banks*, 542 U.S. 406, 411 n.3 (2004).

more speculative connection to innocence," the retroactive application of procedural rules is generally outweighed by the interests of comity (in the case of state convictions) and finality. *Id.*; *see Teague*, 489 U.S. at 308.

The same cannot be said about rules "that go beyond procedural guarantees" and instead affect substantive criminal law. *Montgomery*, 2016 WL 280758, at *9. A substantive rule "alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 353; *Montgomery*, 2016 WL 280758, at *11. "Substantive rules include 'rules forbidding criminal punishment of certain primary conduct,' as well as 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" *Montgomery*, 2016 WL 280758, at *5 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)). They also include "decisions of this Court holding that a substantive federal criminal statute does not reach certain conduct," *Bousley*, 523 U.S. at 620-21, by, for instance, "narrow[ing] the scope of a criminal statute by interpreting its terms," *Schriro*, 542 U.S. at 351-52.

"Such rules apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Id.* at 352 (quotation marks omitted); *Montgomery*, 2016 WL 280758, at *13. Indeed, when a decision of this Court holds that the statute which was thought to authorize a defendant's conviction or sentence is, in fact, unconstitutional (or

otherwise does not authorize the defendant's punishment), it creates not just a "significant risk" but a *certainty* that the defendant faces conviction or punishment that the law cannot impose upon him. For these reasons, substantive rules are "not subject to" the exception to retroactivity drawn in *Teague*. *Montgomery*, 2016 WL 280758, at *5 (quoting *Schriro*, 542 U.S. at 352 n.4).[6]

This Court confirmed these principles in *Bousley v. United States*, where it held that a decision narrowly interpreting the offense defined in 18 U.S.C. § 924(c)(1) was substantive and thus not subject to *Teague*'s bar. 523 U.S. at 616. Bousley claimed that his final conviction was "constitutionally invalid" because he did not knowingly and voluntarily plead guilty to actively employing a firearm—an element of § 924(c)(1) that this Court first recognized in *Bailey v. United States*, 516 U.S. 137 (1995), after Bousley's conviction had become final. *Bousley*, 523 U.S. at 616-17, 618-19. This Court expressly rejected the argument that *Teague* barred retroactive application of *Bailey* to Bousley's final conviction: "Because *Teague* by its terms applies only to procedural rules," the Court observed, "it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by

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[6] *Teague*'s recognition that certain "watershed" procedural rules may also be applied retroactively reflects the same logic: If the court's failure to observe a "bedrock" procedural rule "seriously diminish[es] the likelihood" that it obtained an accurate result, the probability of a substantive injustice is sufficient to outweigh the finality interest. *Teague*, 489 U.S. at 315; *see Bousley*, 523 U.S. at 620.

Congress." *Id.* at 620. As the Court explained, "decisions of this Court holding that a substantive federal criminal statute does not reach certain conduct, like decisions placing conduct beyond the power of the criminal law-making authority to proscribe, necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal." *Id.* (quoting *Teague*, 489 U.S. at 313; *Davis v. United States*, 417 U.S. 333, 346 (1974)) (quotation marks omitted). Because "under our federal system it is only Congress, and not the courts, which can make conduct criminal," denying retroactive application where a criminal statute has been held not to reach a defendant's conduct "would be inconsistent with the doctrinal underpinnings of habeas review." *Id.* at 620-21.

B. *Johnson* Is Substantive, Not Procedural.

Johnson held that the residual clause is void for vagueness and thus unconstitutional in all of its applications. 135 S. Ct. at 2557, 2660. It thereby determined that a defendant cannot constitutionally be sentenced to 15 years to life under the residual clause and instead faces a statutory maximum of 10 years' imprisonment. *Id.*

1. This rule is plainly substantive. By holding that the government cannot constitutionally impose punishment on the basis that a defendant committed "conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B), *Johnson* directly altered "the class of persons that the law punishes." *Schriro*, 542 U.S. at 353. It is a basic principle that "[a]n unconstitutional law is void, and is

as no law." *Montgomery*, 2016 WL 280758, at *10 (quoting *Ex parte Siebold*, 100 U.S. 371, 376 (1880)). "It follows that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful." *Id.* at *8. *Johnson* is therefore substantive for the same reason as *Bailey*: It holds that the statute believed to authorize the defendant's punishment, in fact, did not authorize that punishment, and thus it "'necessarily carr[ies] a significant risk that a defendant' faces a punishment that the law cannot impose upon him." *Schriro*, 542 U.S. at 352-53 (quoting *Bousley*, 523 U.S. at 620).

Because the government could not constitutionally impose 15 years to life under the residual clause, denying retroactive application of *Johnson* would, as in *Bousley*, "be inconsistent with the doctrinal underpinnings of habeas review." *Bousley*, 523 U.S. at 620-21. Consistent with these principles, this Court has on multiple occasions recognized claims for habeas relief on the basis that the statute of conviction was unconstitutionally vague, *see Smith v. Goguen*, 415 U.S. 566, 567-72 (1974) (holding that the statute under which the petitioner was convicted was unconstitutionally vague and applying that rule retroactively to grant habeas relief); *In re Gregory*, 219 U.S. 210, 214 (1911) (holding that the petitioner's claim for relief from his final conviction on the basis that his statute of conviction was "so uncertain as to make the prohibition nugatory" was cognizable on habeas corpus), and "*Teague* continued [the] long tradition" of such retroactive application. *Montgomery*, 2016 WL 280758,

at *9. As the Court has already recognized, "[a] penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional." *Id.* at *10.

Furthermore, *Johnson* is obviously not procedural in nature, such that it would be subject to *Teague*'s bar. The rule *Johnson* announced—that the residual clause is unconstitutionally vague and cannot, in any circumstances, support an increased sentence—plainly does not "regulate only the *manner of determining* [a] defendant's culpability." *Schriro*, 542 U.S. at 353 (emphasis in original). Neither "the use of impeccable factfinding procedures" nor "the use of flawless sentencing procedures" could legitimate an increased sentence under the residual clause, *Montgomery*, 2016 WL 280758, at *8 (quoting *United States v. U.S. Coin & Currency*, 401 U.S. 715, 724 (1971))—it is unconstitutional for a court to increase a defendant's sentence under the residual clause regardless of the procedures it uses in the process. As such, *Johnson* cannot be said to "merely raise the possibility" that a defendant whose sentence was increased under the residual clause "faces a punishment that the law cannot impose upon him." *Schriro*, 542 U.S. at 352. In all cases, a defendant whose qualification under ACCA depended on the residual clause has been subjected to punishment that the court lacked authority to impose in the first place.

Indeed, that *Johnson* has no "procedural component" makes this case easier than this Court's recent decision in *Montgomery*. 2016 WL 280758, at

*14. There, the Court concluded that the rule of *Miller v. Alabama*, 132 S. Ct. 2455 (2012), was substantive and retroactive notwithstanding the fact that *Miller* included certain procedural requirements which, if satisfied, would allow some juvenile offenders to be punished with life without parole. *Johnson* presents no such complexity: In all cases, a court is and was without authority to increase a defendant's sentence based on the residual clause. Because the residual clause increased a defendant's sentence from a *maximum* of 10 years' imprisonment to a *minimum* of 15 years' imprisonment, every person whose qualification under ACCA depended on the residual clause faces *at least* five additional years of confinement that were not authorized by law.[7]

In light of the above, it should be unsurprising that the prevailing (and arguably unanimous) view among the circuits that have considered the issue is that *Johnson* announced a substantive rule and thus applies

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[7] The record in this case is illustrative. Following Petitioner's initial plea to violating § 922(g)(1), absent enhancement, the court instructed Petitioner that sentencing him to more than 10 years' imprisonment would be "more than the law permits" and would amount to "an illegal sentence." Transcript of Plea Colloquy 19, *United States v. Welch*, No. 09-cr-60212 (S.D. Fla. June 18, 2010), ECF No. 54. Only by applying the residual clause to Petitioner's prior convictions for Florida robbery could he be sentenced to 15 years. JA 117a-119a. However, because ACCA's residual clause was in fact "void" and "as no law," *Montgomery*, 2016 WL 280758, at *10 (quoting *Ex parte Siebold*, 100 U.S. 371, 376 (1880)), the court's original instruction was correct: The 15-year sentence was indeed "illegal."

retroactively to cases on collateral review.[8] The circuits have also been unanimous in concluding that this Court's pre-*Johnson* decisions narrowing ACCA, *Begay v. United States*, 553 U.S. 137 (2008) (holding that driving under the influence is not a "violent felony" under ACCA),[9] and *Chambers v. United States*, 555

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[8] *See In re Rivero*, 797 F.3d 986, 989 (11th Cir. 2015) ("The new rule announced in *Johnson* is substantive rather than procedural because it narrowed the scope of section 924(e) by interpreting its terms, specifically, the term violent felony" (brackets omitted)); *In re Watkins*, No. 15-5038, __ F.3d __, 2015 WL 9241176, at *6 (6th Cir. Dec. 17, 2015) ("*Johnson* announced a substantive rule that prohibits the imposition of ACCA's 15-year mandatory minimum sentencing provision on defendants whose status as armed career criminals depends on application of the unconstitutionally vague residual clause"); *Price v. United States*, 795 F.3d 731, 734 (7th Cir. 2015) ("*Johnson*, we conclude, announced a new substantive rule."). Although the Fifth Circuit's reasoning in *In re Williams*, 806 F.3d 325, 325-26 (5th Cir. 2015), could be read to suggest that *Johnson* is not substantive, the court's analysis took place under the more circumscribed inquiry of whether *Johnson* has already been "made retroactive" by this Court, under 28 U.S.C. § 2255(h)(2). The court stated that it was aligning with the "decision and reasoning" of *Rivero*, in which the Eleventh Circuit concluded that *Johnson* is substantive and retroactive on collateral review, but that it has not yet been "made retroactive" by this Court. *Williams*, 806 F.3d at 326; *Rivero*, 797 F.3d at 989.

[9] *See Welch (Devin) v. United States*, 604 F.3d 408, 415 (7th Cir. 2010) (*Begay* is substantive and retroactive because it "narrowed substantially [the petitioner's] exposure to a sentence of imprisonment" and "hardly resembles a procedural device"); *United States v. Doe*, No. 13-4274, __ F.3d __, 2015 WL 8287858, at *15 n.13 (3d Cir. Dec. 9, 2015); *Jones v. United States*, 689 F.3d 621, 624-26 (6th Cir. 2012); *Sun Bear v. United States*, 644 F.3d 700, 703 (8th Cir. 2011); *Bryant v. Warden*, 738 F.3d 1253, 1276 (11th Cir. 2013).

U.S. 122 (2009) (holding that failure to report is not a "violent felony" under ACCA),[10] are substantive rules that must be applied retroactively. *See* Leah M. Litman, *Resentencing in the Shadow of* Johnson v. United States, 28 Fed. Sent'g Rep. 45, 47 (2015) ("It is hard to see how a decision 'interpreting' ACCA's scope would be substantive, but a decision invalidating ACCA's residual clause—which also alters ACCA's scope—would not be.").

2. The rule articulated in *Johnson* is substantive and retroactive notwithstanding that it does not forever prohibit Congress from imposing a particular punishment and that Congress could hypothetically amend ACCA to articulate a valid sentencing enhancement in lieu of the residual clause. *But see In re Williams*, 806 F.3d 322, 325-26 (5th Cir. 2015) (suggesting, in the context of a successive motion under § 2255, that for these reasons *Johnson* does not fall within an "exception to *Teague*"). To limit the category of substantive rules in that manner would be inconsistent with this Court's longstanding precedent and would make little sense as a matter of principle.

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[10] *United States v. Shipp*, 589 F.3d 1084, 1089, 1091 (10th Cir. 2009) (*Chambers* is a "substantive rule of statutory interpretation" because a defendant who "does not constitute an 'armed career criminal'" after *Chambers* has "received 'a punishment that the law cannot impose upon him.'"); *Narvaez v. United States*, 674 F.3d 621, 629 (7th Cir. 2011) (same); *McCarthan v. Warden*, No. 12-14989, __ F.3d __, 2016 WL 234356, at *5 (11th Cir. Jan. 20, 2016) (same); *see also United States v. Powell*, 691 F.3d 554, 563 (4th Cir. 2012) (adopting *Shipp*).

First, to except such rules from retroactivity would contravene this Court's recognition that "*Teague* continued a long tradition of giving retroactive effect to constitutional rights that go beyond procedural guarantees." *Montgomery*, 2016 WL 280758, at *9. Regardless of whether Congress could amend ACCA in the future, there is no reasonable way to characterize *Johnson* as a procedural rule that "regulate[s] only the *manner of determining* [a] defendant's culpability." *Schriro*, 542 U.S. at 353 (emphasis in original).

Second, although rules that immunize particular conduct from punishment or categorically prohibit particular penalties are certainly substantive, *see, e.g.*, *Penry v. Lynaugh*, 492 U.S. 302, 329-30 (1989) (rule categorically prohibiting capital punishment for intellectually disabled persons would be substantive), the Court has never limited the category of substantive rules in that manner. To the contrary, as described above, this Court has recognized that any rule that "alters the range of conduct or the class of persons that the law punishes" is substantive, including, for instance, "decisions that narrow the scope of a criminal statute by interpreting its terms." *Schriro*, 542 U.S. at 351-52, 353. As the Court has recognized, this follows directly from the principles underlying *Teague* and subsequent cases: "[D]ecisions of this Court holding that a substantive federal criminal statute does not reach certain conduct, *like decisions placing conduct beyond the power of the criminal law-making authority to proscribe*," share the hallmark of substantive rules: They "necessarily carry a significant risk that a defendant stands convicted of an act that the law does

not make criminal." *Bousley*, 523 U.S. at 620 (quotation marks omitted) (emphasis added).

Bousley is instructive. There, the Court held that its interpretation of 18 U.S.C. § 924(c)(1) to require "active employment of a firearm" was not subject to *Teague*—even though that statutory interpretation did not permanently deprive Congress of the power to criminalize mere possession of a firearm in relation to a drug crime. The Court did not deem relevant the fact that Congress could later pass a law proscribing such possession (which Congress later did). *See United States v. O'Brien*, 560 U.S. 218, 232 (2010) (describing the amendments to § 924 that were made in "direct response to this Court's decision in *Bailey*"); *see also Goguen*, 415 U.S. at 581-82 (granting habeas corpus on the basis that the petitioner's statute of conviction was unconstitutionally vague, even though "nothing prevents a legislature from defining with substantial specificity" the conduct it intended to criminalize); *infra* Part I.C (discussing numerous cases in which this Court has allowed claims for habeas corpus in the absence of a permanent deprivation of the power to proscribe the underlying conduct or impose a given punishment).[11]

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[11] It would be wrong to distinguish *Bousley* from *Johnson* on the basis that *Bousley* "'explain[ed] what [the statute] has meant ever since [it] was enacted.'" *Williams*, 806 F.3d at 326. Holding that a statute is unconstitutionally vague—no less than interpreting it—is a conclusion as to the valid scope of the statute at the time it was enacted. *See Norton v. Shelby Cty.*, 118 U.S. 425, 442 (1886) ("An unconstitutional act is not a law; it is, in legal contemplation, as inoperative as though it had never been passed."); *Ex parte*

The result in *Bousley* (and in the numerous cases throughout history discussed below) makes sense, because the hypothetical possibility that Congress might amend a statute to punish certain conduct in the future has no bearing on the lawfulness of confinement imposed *in the past* under the statute. Any future amendment to ACCA would not—and, under the Ex Post Facto Clause, *could* not—affect persons who were sentenced under the residual clause prior to *Johnson*. *See Peugh v. United States*, 133 S. Ct. 2072, 2077-78 (2013) ("The Constitution forbids the passage of ex post facto laws, a category that includes '[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.'" (quoting *Calder v. Bull*, 3 Dall. 386, 390 (1798)).

Thus, that *Johnson*'s invalidation of the residual clause did not make certain conduct or persons altogether immune from future punishment is beside the point. *Johnson* articulated a substantive rule and, as such, applies retroactively.

Siebold, 100 U.S. 371, 376-77 (1880) ("An unconstitutional law is void, and is as no law. An offence created by it is not a crime."). It would be irrational to give retroactive effect to a decision that narrows the scope of a federal statute based on statutory interpretation, but not to a decision that does so based on rights enshrined by the Constitution. Litman, *supra*, 28 Fed. Sent'g Rep. at 47.

C. The Origin Of *Teague* And The History Of Habeas Corpus Confirm That *Johnson* Is Substantive And Retroactive.

As this Court has explained, "the category of substantive rules" adopted by this Court "originated in Justice Harlan's approach to retroactivity" in *Mackey v. United States*, 401 U.S. 667 (1971), and *Desist v. United States*, 394 U.S. 244 (1969). *Montgomery*, 2016 WL 280758, at *8; *see Teague*, 489 U.S. at 292, 312. That approach recognized and incorporated the Court's long line of cases holding that habeas corpus is available to a prisoner, like Petitioner, who challenges the constitutionality of the statute that purported to authorize his or her punishment. Although "[t]his Court has not always followed an unwavering line in its conclusions as to the availability of the Great Writ," *Teague*, 489 U.S. at 308 (quotation marks omitted), that proposition has remained a fixed point since at least the nineteenth century.

Justice Harlan thus emphasized in *Mackey* and *Desist* that "'[t]he writ has historically been available for attacking convictions on [substantive] grounds.'" *Montgomery*, 2016 WL 280758, at *9 (quoting *Mackey*, 401 U.S. at 692-93) (second alteration in original). As he explained, such grounds included a variety of claims through which "the petitioner attacked the constitutionality of the federal or state statute under which he had been convicted," *Mackey*, 401 U.S. at 684 (citations omitted), including by arguing that certain "conduct [was] beyond the power of the criminal law-making authority to proscribe," *id.* at 692; *see also Desist*, 394 U.S. at 261 & n.2 (Harlan, J., dissenting)

(explaining that federal courts have always entertained habeas claims in which "the habeas petitioner attacked the constitutionality of the state statute under which he had been convicted"). As Justice Harlan observed—consistent with the principles this Court articulated in *Teague* and subsequent decisions—"[s]ince, in this situation, the State had no power to proscribe the conduct for which the petitioner was imprisoned, it could not constitutionally insist that he remain in jail." *Desist*, 394 U.S. at 261 n.2 (citing *Ex parte Siebold*, 100 U.S. 371 (1880)); *Montgomery*, 2016 WL 280758, at *9.

Justice Harlan identified a variety of constitutional challenges to the statute authorizing the defendant's conviction or punishment (or the manner in which the government enforced that statute) as representative of this class of cases in which habeas relief had traditionally been available, and in which retroactive application would remain appropriate under his proposed approach. *See Mackey*, 401 U.S. at 693 nn.7-8; *Desist*, 394 U.S. at 261 n.2. These included *Ex parte Siebold*, 100 U.S. 371 (1880), *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Crowley v. Christensen*, 137 U.S. 86 (1890). *Mackey*, 401 U.S. at 693 n.8; *see Desist*, 394 U.S. at 261 & n.2; *see also Fay v. Noia*, 372 U.S. 391, 451 (1963) (Harlan, J., dissenting) (citing *Ex parte Lange*, 85 U.S. 163 (1873), as another example of the traditional scope of habeas). As Justice Harlan observed, these historical cases allowed such claims on collateral review without regard to whether the constitutional rule invoked had been recognized at the time of the petitioner's conviction because claims challenging the court's authority to impose punishment

were always understood to fall within "the scope and purposes of the habeas corpus writ." *Mackey*, 401 U.S. at 684. The paradigms selected by Justice Harlan confirm that under his approach—as, indeed, under any other approach that this Court has ever employed—rules like the one announced in *Johnson* apply retroactively to final convictions on collateral review.

In *Siebold*, the Court held that the petitioners' claim that they were convicted pursuant to an unconstitutional statute was cognizable on habeas corpus and thus resolved the merits of their claim. The Court reasoned that a showing that one was convicted pursuant to an unconstitutional law provides a basis for collateral attack because it "affects the foundation of the whole proceedings." 100 U.S. at 376. It explained: "An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." *Id.* at 376-77. Accordingly, if the statute of conviction was later held unconstitutional, it followed that the trial court lacked "jurisdiction" and "authority" to punish the prisoner as it did, and habeas relief was warranted. *Id.*; *see also Montgomery*, 2016 WL 280758, at *9-10.

In *Yick Wo*, the petitioner sought habeas relief on the basis that his conviction for operating a laundry arose from a discriminatory application of a city ordinance, in violation of the Equal Protection Clause of the Fourteenth Amendment. The Court agreed that the ordinance had been administered "with an evil eye and an unequal hand" in violation of the Fourteenth Amendment, and accordingly granted the petitioner

habeas relief from his final conviction. 118 U.S. at 373-74. That is, once again, the constitutional defect invalidated the conviction itself and therefore rendered habeas relief appropriate. *See also Crowley*, 137 U.S. at 92 (allowing and considering the merits of petitioner's habeas claim that his conviction was unconstitutional because it resulted from "the delegation of arbitrary discretion to the police commissioners exercised to deprive the petitioner of the equal protection of the laws").

Justice Harlan also invoked several other cases in which petitioners had challenged on habeas the constitutionality of the statute that authorized their punishment. *See Mackey*, 401 U.S. at 692 n.8 (citing "cases collected in" Anthony G. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 384 n.30 (1964)). In *In re Gregory*, 219 U.S. 210 (1911), for instance, this Court held that a petitioner's claim that he had been denied due process under the Fifth Amendment because he had been convicted under a statute with "words so uncertain as to make the prohibition nugatory" was cognizable on habeas corpus, and therefore resolved the petitioner's claim on the merits. *Id.* at 214. Likewise, in *Ex parte Yarbrough*, 110 U.S. 651 (1884), the Court entertained the petitioner's challenge to the constitutionality of the statute under which he was punished and explained: "If the law which defines the offense and prescribes its punishment is void, the court was without jurisdiction, and the prisoners must be discharged." *Id.* at 654.

Justice Harlan drew these paradigms from a rich historical tradition. Indeed, this Court has repeatedly

granted habeas corpus on the basis of the same fundamental defect at issue here: that the petitioner's punishment was imposed without the authority conferred by a valid statute. In *In re Bonner*, 151 U.S. 242 (1894), for instance, the Court granted habeas relief to a federal prisoner who had been sentenced to imprisonment in a state penitentiary in the absence of a federal statute authorizing that form of punishment. The Court explained that in "either stage" of a criminal proceeding, a court "must keep strictly within the limits of the law authorizing it to take jurisdiction." *Id.* at 256. For example, "[i]f the court is authorized to impose imprisonment, and it exceeds the time prescribed by law, the judgment is void for the excess." *Id.* at 258; *see also In re Mills*, 135 U.S. 263, 269-71 (1890) (same); *Ex parte Lange*, 85 U.S. 163, 164, 175-78 (1873) (granting habeas relief to a prisoner who was subjected to both of two alternative punishments listed in the statute of conviction, on the ground that this violated the Double Jeopardy Clause); *In re Medley*, 134 U.S. 160, 161-62, 166-74 (1890) (granting habeas relief to a prisoner who had been sentenced to solitary confinement, because application of the statute authorizing that punishment violated the Ex Post Facto Clause); *see also Bozza v. United States*, 330 U.S. 160, 166 (1947) ("It is well established that a sentence which does not comply with the letter of the criminal statute which authorizes it is so erroneous that it may be set aside on appeal or in habeas corpus proceedings." (citing *In re Bonner*, 151 U.S. 242)).[12]

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[12] Following its decision to limit the retroactivity of certain procedural rules in *Linkletter v. Walker*, 381 U.S. 618, 622 (1965),

These challenges to a court's authority to impose the punishment that it ordered "represent[] the clearest instance where finality interests should yield." *Mackey*, 401 U.S. at 693 (opinion of Harlan, J.). Indeed, to describe the "finality implications such [cases] present," *id.* at 693 n.8, Justice Harlan referred readers to a passage explaining that "the Supreme Court has consistently entertained federal prisoners' collateral challenges to the 'face' constitutionality of the underlying criminal statute" because "[a] claim that the movant pleaded guilty to a crime under a statute unconstitutional 'on its face' offends none of the finality elements significantly." Anthony G. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 384 & n.30 (1964); *see also Montgomery*, 2016 WL 280758, at *11 ("the retroactive

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the Court continued to "recognize[] full retroactivity as a necessary adjunct to a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place." *United States v. Johnson (Raymond)*, 457 U.S. 537, 550 (1982). It thus hewed to the longstanding principle that a criminal judgment in excess of a court's valid authority is "void *ab initio*." *Id.*; *see, e.g.*, *Goguen*, 415 U.S. 566 (granting habeas relief on the basis that the statute of conviction was unconstitutionally vague); *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970) (explaining that the Court "d[id] not hesitate" to hold that the petitioner was entitled to habeas relief based on a new rule incorporating the Double Jeopardy Clause against the states); *Robinson v. Neil*, 409 U.S. 505, 506 (1973) (holding that the Double Jeopardy Clause's prohibition on dual prosecution by a state and one of its municipalities applies retroactively); *Davis v. United States*, 417 U.S. 333, 346 (1974) (holding that a claim based on an intervening change in statutory interpretation is cognizable on habeas corpus because it alleges that the claimant's "conviction and punishment are for an act that the law does not make criminal").

application of substantive rules does not implicate a State's weighty interests in ensuring the finality of convictions and sentences").

In light of the above, it cannot be doubted that *Johnson* is substantive and applies retroactively. *Johnson* held the residual clause void on its face and unconstitutional in all of its applications. Petitioner's claim—that he was subject to punishment based on that facially invalid statute—has throughout history been a paradigmatic basis for habeas corpus and, like the many cases above, represents "the clearest instance where finality interests should yield." *Mackey*, 401 U.S. at 693.

Moreover, the cases above belie any suggestion that substantive rules are limited to those that forever "deprive[] the State of the power to impose a certain penalty." *Williams*, 806 F.3d at 325-26. In *Gregory*, for instance, the petitioner's claim was allowed on habeas corpus not because he alleged that the operation of a "business of issuing and redeeming so-called 'trading stamps'" was immune from regulation, but because he alleged that the statute of conviction was so vague that it violated the Fifth Amendment. 219 U.S. at 213-15. In *Yick Wo*, the Court granted habeas relief not because the operation of a laundry is constitutionally immune from regulation, but because the application of the ordinance to the petitioners violated equal protection. 118 U.S. at 373-74. And in *Lange*, the Court granted habeas relief not because Congress lacked the power to impose a sentence of one year of imprisonment for stealing a Post Office mailbag, but

because application of the statute to the petitioner violated the Double Jeopardy Clause. 85 U.S. at 176.

II. Because *Johnson* Is Retroactive, The District Court's Judgment Is In Error And The Eleventh Circuit's Denial Of A Certificate Of Appealability Must Be Reversed.

Petitioner is entitled to a certificate of appealability upon making "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). Such a showing has been made when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Petitioner is entitled to a certificate of appealability because he has shown not only that "reasonable jurists could debate" his entitlement to relief, but that any reasonable jurist would agree with it. First, for the reasons stated above, *Johnson* is plainly a substantive rule that must be applied retroactively to Petitioner.

Second, any reasonable jurist would agree that *Johnson* entitles Petitioner to resentencing. To begin with, in his petition to this Court, Petitioner specifically argued that his predicate convictions for Florida robbery (which were essential to his qualification under ACCA) could qualify only by virtue of ACCA's residual clause, Pet. at 5, and the government did not contest

that point. *See* Sup. Ct. R. 15 (objections not raised in certiorari briefing are "deemed waived").[13]

Moreover, the record is clear that, at a minimum, "reasonable jurists could debate" whether Petitioner qualifies under any of ACCA's other clauses: On direct appeal, the Eleventh Circuit analyzed whether Petitioner's Florida robbery predicates could qualify under ACCA's elements clause (the only possible alternative to the residual clause) and concluded that it "arguably would not apply." JA 117a.

In fact, it is clear that Florida robbery does not qualify under the elements clause. In *Johnson (Curtis) v. United States*, 559 U.S. 133, 140 (2010) ("*Curtis Johnson*"), this Court held that Florida battery did not qualify under the elements clause because it did not require as an element the use or threat of "*violent* force," defined as "'extreme physical force'" that is "capable of causing physical pain or injury to another person." *Id.* at 140-41 (quoting *Black's Law Dictionary* 1188 (9th ed. 2009)) (emphasis in original). The same is true of Petitioner's convictions for Florida robbery, which could be committed by taking the property of another with the "use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13 (1) (1992). As the Eleventh Circuit found and the government conceded at sentencing, at the time of Petitioner's convictions, robbery by "use of force" could be committed with

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[13] The government also did not raise, and has thus waived, any procedural objections to this Court's consideration of the questions presented, including procedural default or failure to preserve. Sup. Ct. R. 15.

"'any degree of force,'" no matter how minimal. JA 113a-115a (quoting *McCloud v. State*, 335 So. 2d 257, 258-59 (Fla. 1976)); JA 152a (government conceding that Florida robbery "doesn't have a requirement" as to "the degree of force involved"). Indeed, robbery could be committed by "putting in fear" where the defendant has not used or threatened *any* physical force against the victim's person, *see, e.g.*, *State v. Hawkins*, 790 So. 2d 492, 496 (Fla. 4th Dist. Ct. App. 2001) (requiring only that "the circumstances attendant to a robbery are such as to induce fear in the mind of a reasonable person"), including, for instance, where the defendant has threatened to accuse the victim of sodomy in an attempt to destroy the victim's reputation, *Montsdoca v. State*, 93 So. 157, 162 (Fla. 1922). Because *Curtis Johnson* held that an offense must have violent force as an element, and petitioner's Florida robbery conviction plainly did not, *Curtis Johnson* directly controls and the enhancement cannot stand under the elements clause. Petitioner's qualification under ACCA was thus contingent on the now-void residual clause.

Because any reasonable jurist would conclude that Petitioner is entitled to be resentenced under *Johnson*—or, at a minimum, reasonable jurists could debate his entitlement—the Eleventh Circuit's denial of a certificate of appealability should be reversed. *See Bigelow v. Virginia*, 421 U.S. 809, 827 (1975) (where the outcome of the issue before the Court "is readily apparent," reversal is the appropriate remedy).

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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No. 15-6418

In the Supreme Court of the United States

GREGORY WELCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether *Johnson* v. *United States*, 135 S. Ct. 2551 (2015)—which held that the residual clause in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague—announced a new "substantive" rule of constitutional law that is retroactively applicable in an initial motion to vacate a federal prisoner's ACCA-enhanced sentence under 28 U.S.C. 2255(a).

2. Whether petitioner's conviction for robbery, in violation of Fla. Stat. Ann. § 812.13(1) (West 2006), qualifies as a violent felony that supports a sentence enhancement under the ACCA.

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In the Supreme Court of the United States

No. 15-6418

GREGORY WELCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the court of appeals denying petitioner's application for a certificate of appealability (COA) (J.A. 14a) is unreported. The order of the district court denying petitioner's motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255 (J.A. 25a-27a) is also unreported. A prior opinion in petitioner's case (J.A. 101a-119a) is reported at 683 F.3d 1304.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 2015. The petition for a writ of certiorari was filed on September 2, 2015, and granted on January 8, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1). See *Hohn* v. *United States*, 524 U.S. 236 (1998).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix. App., *infra*, 1a-5a.

STATEMENT

In 2010, following a conditional guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). J.A. 130a. He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. J.A. 132a-133a. The court of appeals affirmed, 683 F.3d 1304, and this Court denied a petition for a writ of certiorari, 133 S. Ct. 913.

In 2013, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. J.A. 79a-100a. The district court denied the motion and declined to issue a certificate of appealability (COA). J.A. 25a-27a. The court of appeals declined to issue a COA and dismissed petitioner's appeal. J.A. 14a.

1. On March 17, 2009, in an investigation of an attempted convenience-store robbery in which two employees were shot, Deputy Sheriff Trevor Goodwin and two other officers knocked on the door to an apartment that the shooter was known to frequent. 09-cr-60212 Docket entry No. (Dkt. No.) 31, at 2 (May 28, 2010). The person who answered said he did not live there or know who did, but that someone else was present although he did not say who. *Ibid.* The officers entered the apartment and conducted a protective sweep to see if anyone inside posed a threat to them. *Id.* at 2-3. During the sweep, deputies discovered an individual, later identified as petitioner, talking on a cell phone and minding a baby. *Id.* at 3.

Deputy Goodwin explained to petitioner that the deputies were looking for the shooter and the gun that

he used during the robbery, and he asked petitioner for permission to search the apartment. Dkt. No. 31, at 3. Petitioner refused to consent to a search. *Ibid.* When the deputies told petitioner they would now have to get a search warrant, which "could take a while," petitioner consented to the search and signed a written consent form. *Ibid.* During a search of the apartment, officers found a Lorcin, Model L380, .380-caliber semi-automatic pistol, loaded with six rounds of ammunition, in "an attic space." *Id.* at 4; Presentence Investigation Report (PSR) ¶ 11. Petitioner gave a recorded statement admitting that he owned the firearm and ammunition. Dkt. 31, at 4. Further investigation revealed that petitioner was a convicted felon. PSR ¶ 11.

2. A federal grand jury in the Southern District of Florida returned an indictment charging petitioner with one count of unlawful possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. 922(g)(1). J.A. 194a-196a. Petitioner moved to suppress both the physical evidence (the gun and ammunition) and his recorded statement, on the grounds that they were fruits of an illegal search of the apartment. Dkt. No. 16 (Mar. 29, 2010).

The district court denied the motion. Dkt. No. 31. Petitioner entered a conditional guilty plea to the Section 922(g)(1) charge, preserving his right to appeal the denial of his suppression motion. Dkt. No. 34, at 1, 9 (June 18, 2010). The district court conducted the colloquy required by Federal Rule of Criminal Procedure 11, accepted petitioner's plea, and set the matter for sentencing. Dkt. Nos. 33, 35 (June 18, 2010).

3. a. A conviction for violating Section 922(g)(1) ordinarily exposes the offender to a statutory maximum sentence of ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, the offender has at least three prior convictions for a "violent felony" or a "serious drug offense," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), requires a minimum sentence of at least 15 years of imprisonment and permits a maximum sentence of life imprisonment. See *Logan* v. *United States*, 552 U.S. 23, 26 (2007); *Custis* v. *United States*, 511 U.S. 485, 487 (1994).

The ACCA defines a "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year * * * that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B). Subsection (i) is known as the elements clause. The first half of Subsection (ii) ("is burglary, arson, or extortion, involves use of explosives") is known as the enumerated-crimes clause. The second half of Subsection (ii) ("or otherwise involves conduct that presents a serious potential risk of physical injury to another") is known as the residual clause. See *Johnson* v. *United States*, 135 S. Ct. 2551, 2556 (2015).

b. The Probation Office concluded that petitioner was an armed career criminal because his criminal history included three qualifying "violent felony" convictions: a 2005 Florida conviction for felony battery (PSR ¶ 33), and two 1996 Florida convictions for robbery (PSR ¶¶ 26-27). See PSR ¶ 21, 95-96. As an

armed career criminal, petitioner's offense level of 30 and criminal history category of VI resulted in an advisory guidelines range of 180 to 210 months of imprisonment. PSR ¶¶ 24, 41, 86, 95-96.[1] Petitioner filed written objections to the PSR, in which he argued, as relevant here, that one of his robbery convictions should not be considered a violent felony. J.A. 191a; see PSR ¶ 27.

The information for the robbery conviction described in paragraph 27 of the PSR alleges that petitioner committed "strong armed robbery" when he unlawfully took jewelry from the person or custody of Joshua Cummings by "the use of force, violence, assault, or putting the [victim] in fear," in violation of Fla. Stat. Ann. § 812.13(1) (West 2006). See J.A. 187a. In his sentencing memorandum, petitioner argued that "[n]othing in either the [i]nformation or [j]udgment establishes the manner in which the robbery was committed" and that the Florida Supreme Court had previously stated that, under the Florida robbery statute, "the degree of force used is immaterial." J.A. 184a-185a (citing *Montsdoca* v. *State*, 93 So. 157, 159 (1922), and *Johnson* v. *State*, 612 So. 2d 689, 690 (Fla. Dist. Ct. App. 1993)). Petitioner contended that Florida robbery therefore does not qualify as a violent felony under the ACCA's elements clause because it can be committed without using "violent

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[1] An offense level of 30 and a criminal history category of VI correspond to a guidelines range of 168 to 210 months of imprisonment. See PSR ¶ 86. The ACCA's 15-year statutory mandatory minimum sentence, however, made the effective guidelines range 180 to 210 months of imprisonment. See Sentencing Guidelines § 5G1.1(c)(2) (court may not impose a sentence that is "less than any statutorily required minimum sentence"); J.A. 159a.

force," as required by *Johnson* v. *United States*, 559 U.S. 133, 141-143 (2010) (*Curtis Johnson*). J.A. 184a-185a. Petitioner further argued that Florida robbery "does not necessarily involve purposeful, violent, and aggressive conduct" and is therefore not a violent felony under the ACCA's residual clause. J.A. 185a (citing *Begay* v. *United States*, 553 U.S. 137, 144-145 (2008)).

The government argued that petitioner's robbery conviction qualified as a violent felony under the elements clause. Dkt. No. 41, at 1-3 (Sept. 17, 2010); see 18 U.S.C. 924(e)(B)(i) (ACCA's elements clause covers a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another"). The government explained that the Florida robbery statute criminalizes "the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear." Dkt. No. 41, at 1-2 (emphasis omitted) (quoting Fla. Stat. Ann. § 812.13 (West 2006)). Therefore, the government concluded, "[a] defendant convicted of robbery either (a) used physical force, or (b) placed his victim in fear of physical force." *Id.* at 3.

c. Before petitioner's sentencing hearing, the parties entered into an amended plea agreement to reflect that petitioner was potentially subject to an ACCA sentence and should be permitted to re-plead to the Section 922(g) charge following a new Rule 11 colloquy that advised petitioner of the enhanced statutory penalties. J.A. 121a; J.A. 141a-142a; see Fed. R.

Crim. P. 11(b)(1)(H) and (I) (requiring court to advise the defendant of the "maximum possible penalty" and "any mandatory minimum penalty"). The new agreement preserved petitioner's right to challenge his classification as an armed career criminal if petitioner were sentenced under the ACCA. J.A. 141a-142a. The court conducted a second plea colloquy with petitioner pursuant to Rule 11, in which it advised petitioner that he faced a minimum of 15 years and a maximum of life imprisonment under the ACCA, accepted petitioner's guilty plea, and adjudged him guilty. J.A. 142a-144a.

The court then proceeded to sentencing. Petitioner's counsel reiterated his objection to petitioner's classification as an armed-career criminal. As relevant here, counsel elaborated on the arguments made in his sentencing memorandum that petitioner's robbery conviction in 1996-CF-005680, PSR ¶ 27, did not categorically qualify as a "violent felony" because it did not satisfy either the elements clause or the residual clause. See J.A. 148a (Florida robbery can be committed with a "minimal amount of force"); *ibid.* (Florida robbery does not categorically require purposeful, violent, or aggressive conduct). The district court overruled petitioner's objection. J.A. 152a-157a. In response to an inquiry from the government about the precise basis for the court's ruling (*i.e.*, whether petitioner's Florida robbery satisfied the ACCA's elements clause or the residual clause), the court stated, "I think it meets both tests, but if it doesn't meet the * * * elements test, I think it meets the residual test." J.A. 158a. The court sentenced petitioner to 180 months of imprisonment, to be followed

by three years of supervised release. J.A. 132a-133a, 160a.

4. Petitioner appealed on the grounds that, *inter alia*, the district court erred in concluding that his robbery conviction qualified as a violent felony under the ACCA. 683 F.3d at 1310. The court of appeals rejected that contention and affirmed. *Id.* at 1309-1314.[2]

The court of appeals noted that, under this Court's 2010 decision in *Curtis Johnson*, the ACCA's elements clause is triggered only if the statute of conviction requires "*violent* force—that is, force capable of causing physical pain or injury to another person." See 683 F.3d at 1313 (quoting *Curtis Johnson*, 559 U.S. at 140). When petitioner pleaded guilty to robbery in Florida state court in 1996, the court explained, Florida law established that taking by "stealth" (*i.e.*, pickpocketing where the victim is unaware of the theft) was larceny, and not robbery. *Id.* at 1311. The court further observed that the state courts of appeal were divided on whether "snatching" (*i.e.*, taking cash from a person's hand or a purse or jewelry from her body) qualified as robbery. *Ibid.* In 1997, the Florida Supreme Court resolved that issue by holding that mere snatching, without any degree of force beyond what is required to remove the property from another person, did not qualify as robbery. *Id.* at 1311 & n.31 (citing *Robinson* v. *State*, 692 So. 2d 883, 886 (Fla. 1997)

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[2] In the district court, petitioner had also contended that his prior conviction for felony battery (PSR ¶ 33) was not a violent felony. See J.A. 146a-147a, 191a. Petitioner did not pursue that challenge on appeal. See 683 F.3d at 1307 ("Only one of the predicate offenses is challenged in this appeal, a 1996 conviction for Florida strong arm robbery.").

(holding that robbery must "be accomplished with more than the force necessary to remove the property from the person")). And in 1999, the Florida legislature reacted by enacting a new statute defining the crime of "robbery by sudden snatching," which falls somewhere between larceny and robbery. *Id.* at 1311.

The court of appeals assumed, without deciding, that petitioner pleaded guilty to robbery at a time when mere snatching was sufficient to constitute robbery under Florida law. 683 F.3d at 1311-1312. But the court found it unnecessary to decide whether sudden snatching "is sufficiently violent under the elements clause," because "[s]udden snatching ordinarily involves substantial risk of physical injury to the victim" and therefore qualifies as a violent felony under the ACCA's residual clause. *Id.* at 1313. The court therefore affirmed petitioner's conviction and sentence. *Id.* at 1314. This Court denied a petition for a writ of certiorari. 133 S. Ct. 913.

5. On December 20, 2013, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255(a). J.A. 79a-100a. He alleged that his guilty plea was invalid because he was misinformed about the possible penalties he faced and that his attorney was ineffective for allowing him to be classified and sentenced as an armed career criminal. J.A. 93a-99a.

a. A magistrate judge recommended that petitioner's motion should be denied. J.A. 28a-69a. The magistrate judge explained that, "even if counsel [for] the defense and the government were unaware early on, when the first Rule 11 proceeding was conducted, that [petitioner] was facing an enhanced sentence as an armed career criminal, certainly by the time the

knowing and voluntary second plea proceeding was concluded, [petitioner] was aware he was facing * * * exposure" to an ACCA sentence of 15 years to life. J.A. 52a. The magistrate judge further explained that, contrary to the allegations underlying petitioner's ineffective-assistance claim, "defense counsel did in fact argue against the enhanced sentence," contending that "the prior state court conviction[] did not qualify as [a] prior crime[] of violence for purposes of the armed career criminal enhancement." *Ibid.* The magistrate judge further concluded that petitioner's ACCA sentence "was proper" and therefore, even assuming counsel had performed deficiently, petitioner had not shown prejudice. J.A. 59a.

b. The district court, after conducting a *de novo* review, adopted the magistrate judge's report and recommendation and denied petitioner's Section 2255 motion. J.A. 25a-27a. The court declined to issue a COA, finding that petitioner could not show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." J.A. 26a (quoting *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000)); see 28 U.S.C. 2253(c). On December 23, 2014, petitioner filed a notice of appeal. 13-cv-62770 Docket entry No. 21.

6. On April 21, 2014, this Court granted a petition for a writ of certiorari in *Johnson*, No. 13-7120, to decide whether the Minnesota offense of unlawful possession of a short-barreled shotgun qualified as a "violent felony" under the ACCA's residual clause. 134 S. Ct. 1871. On January 9, 2015, following briefing and oral argument on that issue, the Court restored the case to the calendar for reargument and directed the parties to file supplemental briefs addressing the

question "[w]hether the residual clause in the [ACCA] is unconstitutionally vague." 135 S. Ct. 939.

On January 30, 2015, petitioner, proceeding pro se, filed an application in the court of appeals for a COA. J.A. 17a-22a. Among other assertions, petitioner noted "his armed career offender status," identified his prior Florida convictions for robbery and battery, and asserted that "[t]hese state priors violate *United States v. Johnson*, [No.] 13-720 8th Cir. 536 [Fed.] Appx. 708, 2013, in the United States Supreme Court, pending an April, 2015, oral argument briefing." J.A. 20a. After citing various cases, he argued that "[a]ll of these cases state that [petitioner's] armed career offender status is unconstitutional and violate[s] [petitioner's] Fifth Amendment right to notice of the state priors." *Ibid.*

On March 27, 2015, petitioner filed a motion in which he urged the court of appeals to "hold this case in [a]beyance" pending the forthcoming decision in *Johnson* "based on the fact that [petitioner] was sentenced under the [residual clause] of the ACCA." J.A. 15a. On June 9, 2015, the court of appeals denied petitioner's application for a COA. J.A. 14a. The court stated that petitioner had "failed to make a substantial showing of the denial of a constitutional right." J.A. 14a (citing 28 U.S.C. 2253(c)(2)).

7. On June 26, 2015, this Court held in *Johnson* that the ACCA's residual clause is unconstitutionally vague and that "[i]ncreasing a defendant's sentence under the clause denies due process of law." 135 S. Ct. at 2557. Petitioner filed a motion requesting an extension of time to file a petition for rehearing in light of *Johnson*, which was returned unfiled "because it [wa]s untimely." J.A. 12a-13a.

8. On September 2, 2015, petitioner filed a pro se petition for a writ of certiorari. He challenged the determination that his robbery conviction was a violent felony under the ACCA, and he contended that *Johnson* had announced a new substantive rule of constitutional law that applies retroactively to cases on collateral review. Pet. 5-8. The government filed a memorandum suggesting that, because the court of appeals had denied petitioner's application for a COA before this Court decided *Johnson*, the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Johnson*. U.S. Mem. 1-3. On January 8, 2016, this Court granted the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

I. *Johnson* announced a substantive rule that applies retroactively to cases on collateral review.

A. Under the framework set forth in *Teague* v. *Lane*, 489 U.S. 288 (1989) (plurality opinion), new rules that govern only procedure are generally not retroactive to cases on collateral review. Procedural rules "are designed to enhance the accuracy of a conviction or sentence by regulating *the manner of determining* the defendant's culpability." *Montgomery* v. *Louisiana*, No. 14-280, 2016 WL 280758, at *8 (Jan. 25, 2016) (citation and internal quotation marks omitted). When a procedural error occurs, the resulting conviction or sentence may still be accurate and therefore lawful, and revisiting prior criminal judgments on collateral review is not justified. In contrast, substantive rules generally apply retroactively to cases on collateral review. Substantive rules forbid certain outcomes regardless of the procedure employed to

impose them. The exemption from *Teague*'s retroactivity bar for substantive rules covers not only new rules that forbid the punishment of certain primary conduct, but also new rules that "prohibit[] a certain category of punishment for a class of defendants because of their status or offense." *Ibid.* (citation and internal quotation marks omitted).

B. The rule announced in *Johnson* is a "new" rule. No prior precedent compelled the Court to hold that the ACCA's residual clause is unconstitutionally vague. To the contrary, before *Johnson*, the Court had twice rejected the argument that the ACCA's residual clause was vague. The Court's holding in *Johnson* therefore broke new ground.

C. The rule in *Johnson* is substantive. Under *Johnson*, the Due Process Clause of the Fifth Amendment bars the imposition of an ACCA sentence (*i.e.*, 15 years to life imprisonment) on prisoners whose classification as armed career criminals depends on the residual clause. The holding of *Johnson* is therefore substantive because it "prohibit[s] a certain category of punishment for a class of defendants because of their status." *Montgomery*, 2016 WL 280758, at *8 (citation and internal quotation marks omitted). Before *Johnson*, a defendant convicted under Section 922(g) who had three or more prior convictions for a serious drug offense or a violent felony, including one or more that satisfied only the residual clause, was required to be sentenced to at least 15 years of imprisonment. Under *Johnson*, however, a defendant convicted under Section 922(g) whose ACCA sentence depends on the residual clause may be sentenced to a maximum term that is no

greater than ten years. That is a substantive change in the law.

That *Johnson*'s rule is substantive is reinforced by the conclusion that it is not procedural. Unlike a procedural rule, where a prisoner's conviction or sentence may still be lawful notwithstanding an error that infected the trial or sentencing, no possibility exists that a sentence of 15 years to life imprisonment remains a valid sentence after *Johnson* for a prisoner whose ACCA sentence depends on the residual clause.

Characterizing the vagueness holding of *Johnson* as a substantive rule accords with *Teague*'s purposes. A prisoner who no longer qualifies for an ACCA sentence under *Johnson* "faces a punishment that the law cannot impose upon him." *Schriro* v. *Summerlin*, 542 U.S. 348, 352 (2004). And refusing to recognize *Johnson* as a substantive rule would raise separation-of-powers concerns. In the federal system, only Congress has the power to define crimes and prescribe punishments. A defendant convicted under 18 U.S.C. 922(g) and who is not eligible for sentencing under the ACCA faces a maximum punishment of ten years of imprisonment. Accordingly, a Section 922(g) defendant who is sentenced to 15 years or more of imprisonment based on a constitutionally infirm sentencing provision is imprisoned for a term unauthorized by any valid statute.

D. *Johnson*'s status as a substantive rule is not undermined by its effect of narrowing the scope of a criminal sentencing statute, rather than placing a specific criminal punishment beyond Congress's power to impose. The Court has recognized that decisions that narrow the scope of a federal criminal statute create substantive rules that are retroactive on collat-

eral review. By the same principle, pre-*Johnson* decisions of this Court narrowing the reach of the ACCA's residual clause as a matter of statutory interpretation were substantive rules. It would be highly anomalous if this Court's statutory-construction decisions narrowing the residual clause received retroactive effect, but the holding of *Johnson* invalidating that clause entirely did not. That conclusion is reinforced by examining the range of constitutional rules deemed retroactive by Justice Harlan in his concurrence in *Mackey* v. *United States*, 401 U.S. 667, 693 & n.8 (1971) (Harlan, J., concurring in part and dissenting in part), which formed the basis for *Teague*'s exemption for substantive rules.

One court of appeals has reasoned that *Johnson*'s holding is not a substantive rule because Congress remains free to impose a 15-year sentence on a defendant with the same prior convictions if it uses language that is not vague. *In re Williams*, 806 F.3d 322, 325-326 (5th Cir. 2015). That reasoning is unsound. This Court's decision in *Bousley* v. *United States*, 523 U.S. 614 (1998), confirms that new rules narrowing the scope of a federal criminal offense have substantive effect, even if Congress could validly amend the statute to prohibit the defendant's conduct. By virtue of the Ex Post Facto Clause, any future amendment of the ACCA cannot apply to defendants who formerly qualified for an enhanced sentence based on the residual clause. As to that class of defendants, *Johnson* forbids the imposition of a 15-year sentence and it is therefore a substantive rule.

E. This case arises in the context of the denial of a COA. Although the Court need only decide that "reasonable jurists could debate" whether *Johnson* is

substantive such that a COA should issue, see *Slack* v. *McDaniel*, 529 U.S. 473, 483-484 (2000), the Court could provide a path for prisoners who need authorization to file second or successive Section 2255 motions by concluding that all reasonable jurists would agree that *Johnson* is substantive, or by simply holding that *Johnson* is a substantive rule in ACCA cases. A ruling in petitioner's favor on that basis would "ma[k]e" *Johnson* retroactive in ACCA cases, thus permitting prisoners to satisfy the gatekeeping requirements of 28 U.S.C. 2255(h)(2) and thereby file timely second or successive motions.

II. On petitioner's direct appeal, the court of appeals did not decide whether the Florida robbery statute required the use of violent force sufficient to satisfy the ACCA's elements clause at the time of petitioner's 1996 conviction for robbery. Now that the residual clause has been invalidated, the court of appeals will need to address that question. Because the court of appeals upheld petitioner's ACCA sentence under the residual clause, and because the court of appeals has not yet analyzed in petitioner's case whether the Florida robbery statute is a violent felony under the elements clause, the Court should vacate the judgment below and leave that issue for resolution by that court.

ARGUMENT

I. *JOHNSON* ANNOUNCED A NEW SUBSTANTIVE RULE OF CONSTITUTIONAL LAW THAT APPLIES RETROACTIVELY TO CASES ON COLLATERAL REVIEW

In *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), the Court held that the ACCA's residual clause is unconstitutionally vague and, consequently, "imposing an increased sentence under the residual clause * * *

violates the Constitution's guarantee of due process." *Id.* at 2563. Under the rule of *Teague* v. *Lane*, 489 U.S. 288 (1989) (plurality opinion),[3] *Johnson* applies to cases on collateral review because it is a substantive decision. *Johnson* holds that the Due Process Clause of the Fifth Amendment bars the imposition of an ACCA sentence on a defendant whose classification as an armed career criminal depends on the residual clause. See 135 S. Ct. at 2560. *Johnson* therefore "prohibit[s] a certain category of punishment for a class of defendants because of their status" and qualifies as a substantive rule. See *Montgomery* v. *Louisiana*, No. 14-280, 2016 WL 280758, at *8 (Jan. 25, 2016) (citation and internal quotation marks omitted).[4]

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[3] Although *Teague* was a plurality opinion, the Court adopted the *Teague* plurality's approach to retroactivity shortly thereafter in *Penry* v. *Lynaugh*, 492 U.S. 302, 313 (1989), abrogated on other grounds, *Atkins* v. *Virginia*, 536 U.S. 304, 312-313 (2002). See *Danforth* v. *Minnesota*, 552 U.S. 264, 266 n.1 (2008). This brief's citations to *Teague* refer to Justice O'Connor's plurality opinion.

[4] Three courts of appeals have determined, in the course of deciding whether to authorize the filing of a second or successive Section 2255 motion, that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review, at least in an initial Section 2255 motion. See *In re Watkins*, No. 15-5038, 2015 WL 9241176, at *3-*4 (6th Cir. Dec. 17, 2015); *Price* v. *United States*, 795 F.3d 731, 734-735 (7th Cir. 2015); *In re Rivero*, 797 F.3d 986, 989-991 (11th Cir. 2015); see also *In re Franks*, No. 15-15456, 2016 WL 80551, at *2 (11th Cir. Jan. 6, 2016). One court of appeals, considering a case in the same posture, has reached the opposite conclusion. *In re Williams*, 806 F.3d 322, 325-326 (5th Cir. 2015).

A. New Substantive Rules Apply Retroactively To Cases On Collateral Review

Retroactivity principles apply differently to cases that are pending on direct and collateral review. In *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), the Court held that a "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Id.* at 328. *Griffith*'s approach to retroactivity for cases not yet final extends to all new rules, regardless of whether the rule is substantive or procedural. See, *e.g.*, *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (expressing "no doubt" that a decision announcing a new procedural rule is retroactive to cases not yet final); *Powell* v. *Nevada*, 511 U.S. 79, 84 (1994) (same).

The judgment against petitioner, however, became final in January 2013, more than two and a half years before *Johnson* was decided, when this Court denied a petition for a writ of certiorari on direct review. See *Clay* v. *United States*, 537 U.S. 522, 527 (2003) ("Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."). In such cases, respect for the finality interests in the judgment dictates a different, more restrictive approach, under which new rules of criminal procedure generally are not applied retroactively. See *Teague*, 489 U.S at 310.

Teague recognized that the retroactivity calculus changes once direct review is complete, because "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the

operation of our criminal justice system." 489 U.S. at 309. Drawing on an approach earlier articulated by Justice Harlan, see *Mackey* v. *United States*, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part); *Desist* v. *United States*, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting), *Teague* charted a different approach to the retroactivity of "new rules"—that is, rules not "dictated by precedent existing at the time the defendant's conviction became final." 489 U.S. at 301 (emphasis omitted); see *id.* at 314 n.2 ("[A] criminal judgment necessarily includes the sentence imposed upon the defendant."). Under that approach, the retroactivity of a new rule to cases on collateral review differs depending on whether the rule is "procedural" or "substantive." *Id.* at 311-313; cf. *Bousley* v. *United States*, 523 U.S. 614, 620 (1998) ("Th[e] distinction between substance and procedure is an important one in the habeas context.").[5]

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[5] Although *Teague* addressed petitions for writs of habeas corpus filed by state prisoners under 28 U.S.C. 2254(a), in *Danforth*, this Court recognized that the lower courts have applied *Teague* to Section 2255 motions and observed that much of *Teague*'s reasoning "seems equally applicable" to motions under Section 2255. 552 U.S. at 281 n.16; see also *Chaidez* v. *United States*, 133 S. Ct. 1103, 1107 (2013) (applying *Teague* to a federal prisoner's petition for a writ of error coram nobis). That position makes sense. *Teague* is grounded substantially in considerations of finality, and "the Federal Government, no less than the States, has an interest in the finality of its criminal judgments." *United States* v. *Frady*, 456 U.S. 152, 166 (1982). In addition, *Teague* "adopt[ed] Justice Harlan's view of retroactivity for cases on collateral review," 489 U.S. at 310, and Justice Harlan did not "make any distinction, for retroactivity purposes, between state and federal prisoners seeking collateral relief," *Mackey*, 401 U.S. at 681 n.1 (opinion of Harlan, J.).

1. Under the *Teague* framework, "new constitutional rules of criminal *procedure* will not be applicable to those cases which have become final before the new rules are announced," 489 U.S. at 310 (emphasis added), unless the new procedural rule falls within a narrow exception for "watershed rules" that "implicat[e] the fundamental fairness and accuracy of the criminal proceedings," *Schriro* v. *Summerlin*, 542 U.S. 348, 352 (2004) (citations omitted); see *Teague*, 489 U.S. at 311-314. That exception is limited to procedural rules that are "necessary to prevent an impermissibly large risk of an inaccurate conviction" and that "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton* v. *Bockting*, 549 U.S. 406, 418 (2007) (citations and internal quotation marks omitted).

2. New substantive rules, however, "generally apply retroactively" and are "not subject to [*Teague*'s] bar." *Summerlin*, 542 U.S. at 351-352 n.4; see *Teague*, 489 U.S. at 311. *Teague* referred to substantive rules as an "exception" to the principle of nonretroactivity. See 489 U.S. at 311. But because *Teague* is only concerned with procedural rules, the Court has since clarified that substantive rules are "more accurately characterized" as exempt from *Teague*'s bar on retroactive application of procedural rules, rather than an exception to it. *Montgomery*, 2016 WL 280758, at *5 (citing *Summerlin*, 542 U.S. at 352 n.4); see also *Bousley*, 523 U.S. at 620 ("*Teague* by its terms applies only to procedural rules").

The Court explained in *Montgomery* that, as originally defined by Justice Harlan, substantive constitutional rules are rules "that place, as a matter of constitutional interpretation, certain kinds of primary, pri-

vate individual conduct beyond the power of the criminal law-making authority to proscribe." 2016 WL 280758, at *8 (quoting *Mackey*, 401 U.S. at 692 (opinion of Harlan, J.)). *Montgomery* further explained that, four months after *Teague*, the Court extended the exemption for substantive rules "to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Ibid.* (quoting *Penry* v. *Lynaugh*, 492 U.S. 302, 330 (1989), abrogated on other grounds, *Atkins* v. *Virginia*, 536 U.S. 304, 312-313 (2002)). Both classes of rules, the Court explained, reflect "substantive categorical guaranties" that "deprive[] the State of the power to impose a certain penalty," "regardless of the procedures followed." *Ibid.* (quoting *Penry*, 492 U.S. at 329-330). Accordingly, a rule that "alters the range of conduct or the class of persons that the law punishes" is a substantive rule. *Summerlin*, 542 U.S. at 353; see *Montgomery*, 2016 WL 280758, at *11.

Substantive conduct-protecting constitutional rules include those cited by Justice Harlan in his separate opinion in *Mackey*, for example, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (right of married couples to use contraception), and *Loving* v. *Virginia*, 388 U.S. 1 (1967) (invalidating ban on interracial marriage). See *Mackey*, 401 U.S. at 692 n.7 (opinion of Harlan, J.) (citing those cases, among others). Substantive penalty-restricting constitutional rules include decisions holding that the Eighth Amendment bars life without parole or the death penalty for certain classes of offenders. See, *e.g.*, *Montgomery*, 2016 WL 280758, at *13 (barring life without parole for juveniles con-

victed of homicide but who are not incorrigible); *Roper* v. *Simmons*, 543 U.S. 551 (2005) (barring death penalty for juveniles); *Atkins* v. *Virginia*, 536 U.S. 304 (2002) (barring death penalty for persons who are intellectually disabled).

New substantive rules can also result from "decisions that narrow the scope of a [federal] criminal statute by interpreting its terms." *Summerlin*, 542 U.S. at 351. This Court recognized that such substantive holdings apply retroactively in *Bousley*. See 523 U.S. at 620-621. *Bousley* considered whether *Teague* barred retroactive application of *Bailey* v. *United States*, 516 U.S. 137 (1995), which interpreted the "use" element of 18 U.S.C. 924(c) (prohibiting "us[ing] or carr[ying] a firearm" "during and in relation to any crime of violence or drug trafficking crime"). *Bailey* held that a violation of Section 924(c) requires evidence of "active employment of the firearm by the defendant," rather than mere possession, 516 U.S. at 143 (emphasis omitted), thus rejecting the test applied by the court below and some other courts of appeals, *id.* at 141-142. In *Bousley*, this Court concluded that *Bailey*'s holding resembled a decision that placed "conduct beyond the power of the criminal law-making authority to proscribe," and thus applied retroactively, because under the separation of powers, only Congress and not the judiciary has power to define federal crimes. 523 U.S. at 620-621 (internal quotation marks omitted).

Substantive rules apply retroactively because they "'necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." *Summerlin*, 542 U.S. at 352 (quot-

ing *Bousley*, 523 U.S. at 620). In those circumstances, the finality interests underlying *Teague* must yield because "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Montgomery*, 2016 WL 280758, at *11 (quoting *Mackey*, 401 U.S. at 693 (opinion of Harlan, J.)); see also *Penry*, 492 U.S. at 330 (finality concerns underlying *Teague* "have little force" with respect to substantive rules).

3. In contrast, new procedural rules "are designed to enhance the accuracy of a conviction or sentence by regulating 'the *manner of determining* the defendant's culpability.'" *Montgomery*, 2016 WL 280758, at *8 (quoting *Summerlin*, 542 U.S. at 353). Procedural rules regulate the process for making the ultimate determination (guilt or innocence, or the statutory sentencing range). For example, a rule requiring cross-examination of an out-of-court declarant, see *Crawford* v. *Washington*, 541 U.S. 36 (2004), or a jury finding beyond a reasonable doubt on the relevant penalty-enhancing fact, see *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), is a procedural rule. Such rules do not alter the authorized range of possible outcomes.

New procedural rules, therefore, "merely raise the possibility" that the now-invalid procedure might have altered the outcome of the proceeding. *Summerlin*, 542 U.S. at 352. They thus have a "more speculative connection to innocence" or sentencing eligibility. *Ibid.* As this Court has explained, "[e]ven where procedural error has infected a trial, the resulting conviction or sentence may still be accurate; and by extension, the defendant's continued confinement may still be lawful." *Montgomery*, 2016 WL 280758, at *8.

Accordingly, finality concerns justify withholding retroactive effect to new procedural rules, outside of the rarely invoked "watershed" category. See *Teague*, 489 U.S. at 309-310; see also *Summerlin*, 542 U.S. at 352 (noting that "it is unlikely that any [new watershed procedural rule] has yet to emerge") (citation, internal quotation marks, and ellipses omitted).

B. *Johnson* Announced A "New" Constitutional Rule

Whether a rule applies retroactively depends initially on whether it is "new." See, *e.g.*, *Chaidez* v. *United States*, 133 S. Ct. 1103, 1107 (2013). A rule is "new" when it "breaks new ground or imposes a new obligation" on the government, meaning that it was not "*dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. A rule is "dictated by precedent" only if the rule "would have been apparent to all reasonable jurists" who considered the issue. *Chaidez*, 133 S. Ct. at 1107 (citation and internal quotation marks omitted); *Lambrix* v. *Singletary*, 520 U.S. 518, 527-538 (1997).

The rule announced in *Johnson* was unquestionably "new." The holding in *Johnson* was not dictated by precedent; to the contrary, it required the overruling of precedent. Before *Johnson*, the Court had twice rejected the argument that the ACCA's residual clause was unconstitutionally vague when that argument was pressed in dissenting opinions. See *James* v. *United States*, 550 U.S. 192, 210 n.6 (2007) ("While ACCA requires judges to make sometimes difficult evaluations of the risks posed by different offenses, we are not persuaded by Justice Scalia's suggestion * * * that the residual provision is unconstitutionally vague."); see also *Sykes* v. *United States*, 564 U.S. 1,

15-16 (2011). To conclude as it did, *Johnson* had to overrule "[the] contrary holdings in *James* and *Sykes*." *Johnson*, 135 S. Ct. at 2563. "The explicit overruling of an earlier holding no doubt creates a new rule." *Saffle* v. *Parks*, 494 U.S. 484, 488 (1990); accord *Graham* v. *Collins*, 506 U.S. 461, 467 (1993). Applying those principles, "*Johnson* announce[d] a new rule: It explicitly overrule[d] [a] line of Supreme Court decisions * * * and it broke new ground by invalidating a provision of ACCA." *Price* v. *United States*, 795 F.3d 731, 732 (7th Cir. 2015).

C. *Johnson* Announced A "Substantive" Rule For ACCA-Enhanced Sentences

When a prisoner's ACCA sentence depends on one or more prior convictions that qualified as violent felonies under the ACCA's residual clause, the holding of *Johnson* invalidating the residual clause for vagueness under the Due Process Clause is a substantive, penalty-restricting constitutional rule. *Johnson* therefore has retroactive effect in cases on collateral review challenging an ACCA sentence.

1. As discussed above, pp. 17-24, *supra*, the exemption for substantive rules from *Teague*'s general bar on retroactivity covers "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry*, 492 U.S. at 329-330; see *Montgomery*, 2016 WL 280758, at *5. A new penalty-restricting rule is substantive "if it alters the range of conduct or the class of persons that the law punishes." *Summerlin*, 542 U.S. at 353; *Montgomery*, 2016 WL 280758, at *11.

Johnson's invalidation of the residual clause is a substantive rule because, under the holding of *Johnson*, the Fifth Amendment's Due Process Clause bars

the imposition of an ACCA sentence (*i.e.*, a term of imprisonment of 15 years to life, see 18 U.S.C. 924(e)), on prisoners whose classification as armed career criminals depends on the residual clause. *Johnson* held that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." 135 S. Ct. at 2563; see *id.* at 2557 ("Increasing a defendant's sentence under the clause denies due process of law."). The holding of *Johnson* thus "prohibit[s] a certain category of punishment for a class of defendants because of their status." *Penry*, 492 U.S. at 330; see *In re Watkins*, No. 15-5038, 2015 WL 9241176, at *6 (6th Cir. Dec. 17, 2015) (*Johnson* is a substantive rule because it "prohibits the imposition of an increased sentence on those defendants whose *status* as armed career criminals is dependent on offenses that fall within the residual clause."); *Price*, 795 F.3d at 734 ("In deciding that the residual clause is unconstitutionally vague, the Supreme Court prohibited 'a certain category of punishment for a class of defendants because of their status.'") (quoting *Saffle*, 494 U.S. at 494).

Before *Johnson*, a defendant convicted under 18 U.S.C. 922(g) who had three or more prior convictions for a serious drug offense or a violent felony—including a violent felony that qualified only under the ACCA's residual clause—faced a minimum of 15 years of imprisonment and could be sentenced to any term of imprisonment from 15 years to life. See 18 U.S.C. 924(e). After *Johnson*, however, a defendant convicted under Section 922(g) whose ACCA sentence depended on the residual clause can be sentenced only to a maximum of ten years of imprisonment. See 18

U.S.C. 924(a)(2). That is a substantive change in the law. It "alters * * * the class of persons," *Summerlin*, 542 U.S. at 353, authorized to be punished under the ACCA with an enhanced sentence of 15 years to life by removing from that class persons who qualify only by virtue of a residual-clause conviction.

Subjecting a defendant whose ACCA sentence depends on the residual clause to 15 years or more of imprisonment violates the Constitution. See *Johnson*, 135 S. Ct. at 2560 ("Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process."). As the Court explained in *Montgomery*, "when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful." 2016 WL 280758, at *8. And "[a] penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional." *Id.* at *10.

2. That *Johnson* announced a substantive rule is reinforced by the conclusion that it clearly is not a procedural rule. Procedural rules "are designed to enhance the accuracy of a conviction or sentence by regulating 'the *manner of determining* the defendant's culpability.'" *Montgomery*, 2016 WL 280758, at *8 (quoting *Summerlin*, 542 U.S. at 353). Unlike a procedural rule, where a prisoner's "conviction or sentence may still be accurate" and his "continued confinement may still be lawful" notwithstanding an error that infected a trial or sentencing proceeding, *ibid.*; see *Summerlin*, 542 U.S. at 352, the rule in *Johnson* eliminates the possibility of imposing a valid sentence of 15 years to life imprisonment for a prison-

er whose ACCA sentence depends on the residual clause. The effect of *Johnson* is not to impose a higher burden of proof, alter the admissible evidence, or change the factfinder—classic procedural rules. Rather, *Johnson*'s effect is to strike the residual clause entirely as "void for vagueness." 135 S. Ct. at 2562.[6]

The holding of *Johnson* does have a procedural component, in that it requires a court to determine whether a defendant belongs to the class of prisoners whose ACCA sentences depended on the residual clause. In this case, for example, further procedures will be required to determine whether petitioner remains eligible for an ACCA sentence because his prior conviction for Florida robbery may satisfy the ACCA's elements clause. See Part II, *infra*; see *Johnson*, 135 S. Ct. at 2563 (decision invalidating the resid-

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[6] The substantive, non-procedural character of *Johnson* is evident from considering how Section 924(e)(2)(B) reads in light of the Court's decision that the residual clause is "void." The provision now covers a "crime punishable by imprisonment for a term exceeding one year * * * that"—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, ~~or otherwise involves conduct that presents a serious potential risk of physical injury to another~~[.]

135 S. Ct. at 2563 (noting that the Court's decision "does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony"). No quantum of evidence can expose a defendant to an ACCA sentence based on a conviction that qualified only under the voided language, for "[a]n unconstitutional law is void, and is as no law." *Montgomery*, 2016 WL 280758, at *10 (quoting *Ex parte Siebold*, 100 U.S. 371, 376 (1880)).

ual clause "does not call into question * * * the remainder of the [ACCA]'s definition of a violent felony"). The existence of "a procedural requirement necessary to implement a substantive guarantee," however, does not transform *Johnson*'s substantive holding into a procedural rule. See *Montgomery*, 2016 WL 280758, at *14. Any suggestion that *Johnson* is procedural because of the need for a sentencer to determine whether the defendant "falls within the category of persons whom the law may no longer punish" "conflates a procedural requirement necessary to implement a substantive guarantee with a rule that regulates only the manner of determining the defendant's culpability." *Ibid.* (citation, internal quotation marks, and emphasis omitted).

3. Characterizing the vagueness holding of *Johnson* as substantive accords with *Teague*'s objectives. Substantive rules apply retroactively because they "'necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." *Summerlin*, 542 U.S. at 352 (quoting *Bousley*, 523 U.S. at 620). In those circumstances, the finality interests underlying *Teague* should yield. *Montgomery*, 2016 WL 280758, at *11; *Penry*, 492 U.S. at 330. Prisoners with ACCA sentences that depend on the now-invalid residual clause "face[] a punishment that the law cannot impose upon [them]." *Summerlin*, 542 U.S. at 352. Such defendants will serve at least five years longer than the penalty that Congress validly authorized for their underlying offenses. Collateral review is warranted to correct that error because "little societal interest" exists "in permitting the criminal process to rest at a point where it

ought properly never to repose." *Montgomery*, 2016 WL 280758, at *11 (quoting *Mackey*, 401 U.S. at 693 (opinion of Harlan, J.)).

Beyond that deprivation of liberty, the refusal to recognize *Johnson* as a substantive rule would raise separation-of-powers concerns. In the federal system, "[i]t is the legislature, not the Court, which is to * * * ordain [the] punishment [for a crime]." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.); see also *Whalen* v. *United States*, 445 U.S. 684, 689 (1980) ("the power * * * to prescribe the punishments to be imposed upon those found guilty of [federal crimes] resides wholly with the Congress"). Accordingly, "a defendant may not receive a greater sentence than the legislature has authorized." *United States* v. *DiFrancesco*, 449 U.S. 117, 139 (1980). Leaving in place an invalid ACCA sentence that relies on a statute later held to be void for vagueness violates those principles. A judicial error in applying a statute cannot justify refusing to correct a sentence that exceeds the maximum term validly authorized by Congress for that offender.

D. *Johnson* Is A Substantive Rule Notwithstanding That It Does Not Protect Future Defendants From ACCA Punishment Based On Their Prior Convictions

In *Montgomery*, this Court stated that "[s]ubstantive rules * * * set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose." 2016 WL 280758, at *8. The rule in *Johnson* does not prevent Congress from amending the ACCA prospectively to encompass some or all of the convictions ruled ineligible for enhancement by *Johnson*, provided that it does so with sufficiently precise and

constitutionally valid language. But that possibility does not undermine the substantive character of *Johnson* itself. The Court's holding prevents the imposition of ACCA punishment on defendants who are covered by its rule, and those defendants have therefore received "a punishment that the law cannot impose" on them. *Summerlin*, 542 U.S. at 352.

1. While *Johnson* involved a constitutional rule, its effect is comparable to a rule that narrows the scope of ACCA as a matter of statutory construction. Before *Johnson*, certain convictions qualified under the residual clause; after *Johnson*, none do. The effect of *Johnson*'s rule is identical to (but more sweeping than) the effect of *Begay* v. *United States*, 553 U.S. 137 (2008), and *Chambers* v. *United States*, 555 U.S. 122 (2009), each of which narrowed the construction of the residual clause with the effect of excluding certain convictions from qualifying for the enhancement. See *Begay*, 553 U.S. at 148 (New Mexico crime of driving under the influence "falls outside the scope" of the residual clause); *Chambers*, 555 U.S. at 130 (Illinois failure-to-report offense "falls outside the scope" of the residual clause); see also *Johnson*, 135 S. Ct. at 2556.

The narrowing constructions in *Begay* and *Chambers* constituted new substantive rules, on the same principle that this Court adopted in holding that "decisions that narrow the scope of a [federal] criminal statute" constitute new substantive rules. *Summerlin*, 542 U.S. at 351; see *Bousley*, 523 U.S. at 620-621. Both types of rules "necessarily carry a significant risk that a defendant stands convicted," or received a sentence, "for an act that the law does not make criminal" or authorize to be punished. 523 U.S. at 620

(citation and internal quotation marks omitted). Congress, "and not the courts," has the power to define federal crimes and accompanying punishments. *Id.* at 620-621; see p. 30, *supra*. It follows that a substantive penalty-restricting rule produced by a statutory interpretation that narrows the scope of a federal sentencing provision is exempt from *Teague*'s general bar on retroactivity because it places a particular penalty off limits. Cf. *Montgomery*, 2016 WL 280758, at *8 (addressing constitutional rules that "prohibit[] a certain category of punishment for a class of defendants because of their status") (quoting *Penry*, 492 U.S. at 329). Accordingly, both *Begay* and *Chambers* constituted new substantive rules that were retroactive in ACCA cases on collateral review. And before *Johnson*, lower courts so held, granting collateral relief to defendants whose sentences were erroneously enhanced under the ACCA.[7]

Just as *Begay* and *Chambers* "alter[ed] * * * the class of persons that the law punishes" and thereby created a class of prisoners who received sentences that "the law cannot impose upon [them]," *Summerlin*, 542 U.S. at 352-353, so does *Johnson*. It would be highly incongruous if statutory-construction decisions

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[7] See *Mackey* v. *Warden*, 739 F.3d 657, 662 (11th Cir. 2014), and *Bryant* v. *Warden*, 738 F.3d 1253, 1277-1278 (11th Cir. 2013) (both applying circuit precedent interpreting *Begay* in collateral review of ACCA sentences under 28 U.S.C. 2241); see also *Welch* v. *United States*, 604 F.3d 408, 415 (7th Cir. 2010) (same, in motion under 28 U.S.C. 2255), cert. denied, 131 S. Ct. 3019 (2011); *United States* v. *Shipp*, 589 F.3d 1084, 1091 (10th Cir. 2009) (finding *Chambers* to be a substantive rule, applicable on motion under Section 2255, because in light of *Chambers*, the defendant has "received 'a punishment that the law cannot impose upon him'") (quoting *Summerlin*, 542 U.S. at 352).

like *Begay* and *Chambers* were afforded retroactive effect because they narrowed the scope of the ACCA's residual clause as a matter of statutory interpretation, but the constitutional holding of *Johnson* invalidating the clause in its entirety did not. Both types of decisions narrow a penalty provision and create a subset of prisoners who fall outside the "class of persons that the law punishes." *Summerlin*, 542 U.S. at 353.

2. The conclusion that a substantive rule need not place a punishment beyond legislative reach for all time is reinforced by Justice Harlan's own explanation of a substantive rule. See *Montgomery*, 2016 WL 280758, at *8 (noting origins of *Teague*'s category of substantive rules in Justice Harlan's approach). In *Mackey*, Justice Harlan cited several cases in support of his description of substantive constitutional rules as those placing "conduct beyond the power of the criminal law-making authority to proscribe." See *Mackey*, 401 U.S. at 692-693 & nn.7-8 (opinion of Harlan, J.). One example that Justice Harlan cited in explaining that the writ of habeas corpus had historically been available for attacking convictions "on such grounds" was *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). See *Mackey*, 401 U.S. at 692-693 & n.8.

In *Yick Wo*, the petitioners were imprisoned for violating San Francisco ordinances that required a license to operate laundry businesses in wooden buildings. 118 U.S. at 366. The Court held that the petitioners were entitled to habeas corpus relief because the ordinances as written and administered amounted to "a practical denial by the state of that equal protection of the laws" secured by the Fourteenth Amendment. *Id.* at 373. In so holding, the Court explained that the ordinance conferred on officials "a naked and

arbitrary power" that "acknowledge[d] neither guidance nor restraint," *id.* at 366-367, and that was employed by the board of supervisors to deny licenses to all Chinese applicants, while granting licenses to non-Chinese applicants, *id.* at 374. The Court accordingly concluded that "the imprisonment of the petitioners" for violating the license law was "illegal, and they must be discharged." *Ibid.* The petitioners in *Yick Wo* were entitled to habeas relief not because it was beyond the power of the State to require a license for the operation of a laundry in a building made of wood. Rather, they were entitled to relief because the municipal law provided no standards to govern the decisionmaker's discretion and it was employed for discriminatory purposes.

A decision invalidating a criminal law on equal protection grounds may often have the character of a substantive constitutional holding, even though a law regulating the same conduct through a different classification might be upheld. For example, in *McLaughlin* v. *Florida*, 379 U.S. 184 (1964), this Court invalidated a state law prohibiting interracial cohabitation as a denial of equal protection, while noting that other state provisions, that were "neutral as to race" and that "express[ed] a general and strong state policy against promiscuous conduct, * * * if enforced, would reach illicit relations of any kind." *Id.* at 196. The possibility that the defendant's conduct might be reached under a different statute that regulated the conduct in an evenhanded manner does not detract from the substantive character of the Court's decision—or justify leaving in force a conviction under a statute that violated the Equal Protection Clause on the premise that a more neutral statute might be

enacted. A defendant should be able to attack such a conviction on habeas, even if the underlying conduct might not be protected against all regulation.

That reasoning applies fully to the residual clause. Defendants with prior convictions are not immune from recidivist enhancements. But this Court determined that ACCA's residual clause was a "shapeless" enhancement provision with "hopeless indeterminacy"; it therefore created "unavoidable uncertainty and arbitrariness of adjudication" and reflected a "'judicial morass that defies systemic solution,' 'a black hole of confusion and uncertainty' that frustrates any effort to impart 'some sense of order and direction.'" *Johnson*, 135 S. Ct. at 2558, 2560, 2562 (quoting *United States* v. *Vann*, 660 F.3d 771, 787 (4th Cir. 2011) (Agee, J., concurring)). Even some crimes that arguably presented "straightforward" cases for residual-clause coverage, the Court concluded, dissolve into uncertainty upon closer inspection. *Id.* at 2561 (discussing Connecticut offense of "rioting at a correctional institution," which "certainly sounds like a violent felony," but might not be in light of Connecticut's definition of the offense to include taking part in "any disorder" or "organized disobedience"). Accordingly, the Court invalidated the residual clause across the board. The possibility that Congress could restore enhanced punishment for a conviction for possession of a short-barreled shotgun, the offense at issue in *Johnson*, 135 S. Ct. at 2556, or any other conviction formerly covered only under the residual clause, would not restore ACCA eligibility to Johnson himself, or anyone like him.

3. One court of appeals has held otherwise, but its reasoning does not withstand analysis. In *In re Wil-*

liams, 806 F.3d 322 (2015), the Fifth Circuit held, in the context of denying an application for authorization to file a second or successive Section 2255 motion, that the holding of *Johnson* is not a substantive rule that applies retroactively on collateral review. *Id.* at 325-326; see 28 U.S.C. 2255(h)(2) (courts of appeals may authorize a second or successive Section 2255 motion if the prisoner's claim relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable"). The court reasoned that "*Johnson* does not forbid the criminalization of any of the conduct covered by the ACCA." *Id.* at 325. To the contrary, the court explained, because *Johnson* invalidated the residual clause on vagueness grounds, Congress is free after *Johnson* to impose a 15-year sentence on a defendant with the same prior convictions as Williams if it does so using language that is not vague. *Id.* at 325-326. According to the Fifth Circuit, *Johnson* therefore did not announce a substantive rule because it does not "forbid a certain category of punishment" for the class of defendants that have the same prior convictions as Williams. *Ibid.*[8]

For the reasons explained above, the Fifth Circuit's reasoning is unsound. Congress's ability to amend ACCA is no more relevant to *Johnson*'s substantive nature than is Congress's ability to amend a substantive criminal law after a decision of this Court that narrows its scope. In *Bousley*, for example, the Court

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[8] Williams requested this Court to issue a petition for a writ of mandamus or an original writ of habeas corpus to review that holding, but, after requesting a response from the government to the mandamus petition, this Court denied both petitions. See *In re Williams*, Nos. 15-758 & 15-759 (Jan. 11, 2016).

held that its decision in *Bailey*, which narrowed the construction of "use" a firearm in 18 U.S.C. 924(c)(1) to exclude possession offenses, was "substantive" and retroactive, see 523 U.S. at 620-621, even though Congress could have amended (and in fact later did amend) Section 924(c)(1) to restore possession offenses to the statute. See *United States* v. *O'Brien*, 560 U.S. 218, 232-233 (2010) (discussing the post-*Bailey* amendment colloquially known as the "Bailey Fix Act"). The Fifth Circuit distinguished *Bousley* because it believed that *Bousley* "was decided completely outside of the *Teague* framework." *Williams*, 806 F.3d at 326. But in *Summerlin*, this Court cited *Bousley* to explain that "[n]ew *substantive* rules generally apply retroactively" and that "[t]his includes decisions that narrow the scope of a criminal statute by interpreting its terms." 542 U.S. at 351-352; see also *id.* at 352 n.4.

Congress's power to amend the ACCA to cure any vagueness issue does not prevent the holding of *Johnson* from being substantive because such an amendment could never apply to Johnson or to the class of prisoners who committed their Section 922(g) offenses before any such hypothetical amendment. By virtue of the Ex Post Facto Clause, U.S. Const. Art. 1, § 9, Cl. 3, any future amendment of the ACCA that might expand the type of convictions that qualify as predicate offenses cannot apply retroactively to defendants who formerly qualified for ACCA because of the residual clause. See *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (ex post facto law includes a law that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed"); see also *Peugh* v. *United States*, 133 S.

Ct. 2072, 2081 (2013) (ex post facto law is "a term of art with an established meaning at the time of the framing" and applying altered-punishment category of ex post facto laws from *Calder*) (internal quotation marks omitted). For that class of defendants, *Johnson* "prohibit[s] a certain category of punishment" and constitutes a substantive, retroactive rule. *Penry*, 492 U.S. at 330. Accordingly "Congress'[s] ability to amend ACCA in a manner that would constitutionally impose the category of punishment [a prisoner] seeks to challenge is irrelevant to the retroactivity analysis." *Watkins*, 2015 WL 9241176, at *6.[9]

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[9] This case does not present any issue concerning whether *Johnson* is retroactive to cases on collateral review where a defendant faced an enhanced range because of the residual clause in the federal Sentencing Guidelines. See Sentencing Guidelines § 4B1.2(a)(2) (defining "crime of violence" to include convictions covered by an identical residual clause to the ACCA's residual clause); see also 81 Fed. Reg. 4741, 4743 (Jan. 27, 2016) (Sentencing Commission amendment, effective August 1, 2016, amending Sentencing Guidelines § 4B1.2(a)(2) to delete the residual clause as a matter of policy in light of "many of the same concerns cited by the Supreme Court in *Johnson*"). *Johnson* did not address whether its holding applies to the Guidelines. In cases on direct review, the courts of appeals have disagreed on that issue. Compare *United States* v. *Madrid*, 805 F.3d 1204, 1210-1211 (10th Cir. 2015) (agreeing with the government that it does), with *United States* v. *Matchett*, 802 F.3d 1185, 1193-1196 (11th Cir. 2015) (disagreeing with the government), petition for reh'g en banc pending, No. 14-10396 (11th Cir. filed Oct. 13, 2015). But in Guidelines cases on collateral review, the government has argued that *Johnson* is not entitled to retroactive effect, because the Guidelines are part of the process for imposing sentence, rather than a set of substantive rules that alter the statutory boundaries of sentencing. See U.S. Br. at 8-12, *In re Rivero*, No. 15-13089 (11th Cir. Sept. 28, 2015). That issue has not yet been resolved by any court of appeals.

E. This Court Should Hold That *Johnson* Is A Substantive Rule In The Context Of Determining Whether A COA Should Issue

This case comes to the Court on the court of appeals' denial of a COA. See J.A. 14a. Ordinarily, the only question at that stage is whether a prisoner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Such a showing is made when a claim is reasonably debatable. This Court can, however, conclude that the COA standard is satisfied because *Johnson* is in fact a substantive rule that applies retroactively on collateral review. It should do so here.

1. This case is an unusual posture because petitioner did not raise any vagueness challenge to the residual clause in his Section 2255 motion, nor did the court of appeals expressly address that issue in its pre-*Johnson* denial of a COA. At the time, that denial was correct. But petitioner did articulate his reliance on the claim at issue in *Johnson* in his pro se motion seeking a COA. J.A. 20a. And, although the court of appeals did not have the benefit of *Johnson*, this Court's decision constitutes intervening authority that it is appropriate to consider in determining whether a COA should issue. Cf. *Joseph* v. *United States*, 135 S. Ct. 705, 706 (2014) (statement of Kagan, J., joined by Ginsburg and Breyer, JJ., respecting the denial of certiorari) (noting routine practice of circuits on direct appeal to "accept[] supplemental or substitute briefs * * * when this Court issues a decision that upsets precedent relevant to a pending case and thereby provides an appellant with a new theory or claim").

Petitioner has met the COA standard because, at a bare minimum, in light of *Johnson*, he has made a

"substantial showing" that his sentence reflects "the denial of a constitutional right." 28 U.S.C. 2253(c)(2); *Slack* v. *McDaniel*, 529 U.S. 473, 483-484 (2000). And while the Court need only decide that "reasonable jurists could debate" whether *Johnson* is substantive such that a COA should be granted on that issue, *Miller El* v. *Cockrell*, 537 U.S. 322, 336 (2003), the Court could conclude that all reasonable jurists would agree that *Johnson* is substantive, which would authoritatively resolve the issue of *Johnson*'s retroactivity. *Slack*, 529 U.S. at 484 (prisoner's burden is to show that "reasonable jurists could debate (*or, for that matter, agree that*) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further") (emphasis added) (citation and internal quotation marks omitted).

Alternatively, the Court could simply hold that *Johnson* is a substantive rule in ACCA cases, thus settling the retroactivity issue for the lower courts. On occasion in analogous circumstances, the Court has announced the correct rule when determining whether a COA should have been issued, rather than holding only that the issue is reasonably debatable or explicitly stating that all reasonable jurists would agree about the proper resolution. See *Trevino* v. *Thaler*, 133 S. Ct. 1911, 1921 (2013) (holding that procedural default did not bar state prisoner's ineffective-assistance-of-counsel claim, where the court of appeals had affirmed the denial of a COA on that issue because of that court's view that "reasonable jurists cannot disagree with the district court's procedural ruling" on default, see *Trevino* v. *Thaler*, 449 Fed. Appx. 415, 426 (5th Cir. 2011)); *Jimenez* v. *Quarterman*, 555 U.S. 113, 121

(2009) (holding that a state prisoner's conviction was not yet final for purposes of federal statute of limitations, where court of appeals had denied a COA based on a contrary reading of the statute). No procedural impediment would prevent the Court from taking the same course here.

2. The Court's resolution of *Johnson*'s retroactivity is appropriate because it would resolve a wider conflict in the courts of appeals. Petitioner's case involves an initial collateral attack under Section 2255(a). The conflict in the courts of appeals on the question whether *Johnson* is retroactive. however, developed in the context of denials of authorization for leave to file second or successive Section 2255 motions, which raise the question whether this Court has "made" *Johnson* retroactive. A decision holding that *Johnson* is retroactive would answer that question.

a. Federal prisoners who completed their initial round of collateral review before *Johnson* may not file a "second or successive" Section 2255 motion seeking to invoke that decision unless they obtain pre-filing authorization from the court of appeals certifying that their claims rely on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. 2255(h)(2); see also 28 U.S.C. 2244(b)(3)(C). As the government has explained, the courts of appeals that have considered gatekeeping motions under 28 U.S.C. 2255(h) are divided on the question whether this Court "made" *Johnson* retroactive to cases on collateral review and on the methodology for answering that question. See U.S. Br. at 13-15, *In re Williams*, No. 15-758 (filed Dec. 22, 2015); see also Pet. 8. That conflict, however, is not directly reviewable by

this Court because Congress has barred certiorari review of denials of authorization to file successive collateral attacks. See 28 U.S.C. 2244(b)(3)(E), 2255(h); see generally *Felker* v. *Turpin*, 518 U.S. 651 (1996) (upholding Section 2244(b)(3)(E) against constitutional challenges).

b. Petitioner's case does not provide an occasion for resolving the disagreement in the lower courts on the methodology for deciding when this Court has "made" a decision retroactive. See generally *Tyler* v. *Cain*, 533 U.S. 656 (2001). That issue is unique to second or successive Section 2255 motions. But a ruling in petitioner's favor could "ma[k]e" *Johnson* retroactive and permit prisoners who had previously litigated a Section 2255 motion to satisfy the gatekeeping requirements of 28 U.S.C. 2255(h)(2). A ruling that *Johnson* is retroactive in ACCA cases would establish that this Court has made it so and clear the way for authorization of second or successive motions. Because multiple cases are in that posture and because statute-of-limitations considerations may preclude relief in such cases absent a definitive retroactivity ruling from this Court this Term, the Court should resolve the disagreement over whether *Johnson* is retroactive by holding that it is.[10]

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[10] Prisoners seeking to file second or successive motions must comply with a one-year statute of limitations in 28 U.S.C. 2255(f)(3). That period runs from the date *Johnson* was decided, not from the date of a decision holding it retroactive. See *Dodd* v. *United States*, 545 U.S. 353, 357 (2005). Defendants would therefore need to receive gatekeeping authorization in order to file Section 2255 motions by June 26, 2016 (one year after the decision in *Johnson*), absent application of equitable-tolling doctrine or the government's waiver of the limitations period. See 28 U.S.C. 2244(b)(3)(D) (court of appeals "shall grant or deny authorization

II. THE COURT OF APPEALS SHOULD DECIDE IN THE FIRST INSTANCE WHETHER PETITIONER'S CONVICTION FOR ROBBERY IS A VIOLENT FELONY UNDER THE ELEMENTS CLAUSE

In addition to the question of *Johnson*'s retroactivity, the Court also granted certiorari on the question whether the district court erred when it denied petitioner's Section 2255 motion, which had alleged that one of petitioner's Florida robbery convictions (see PSR ¶ 27) that was relied upon to impose an ACCA sentence was not a violent felony. See Pet. i. On petitioner's direct appeal, the court of appeals did not decide whether the Florida robbery statute required the use of violent force sufficient to satisfy the ACCA's elements clause at the time petitioner was convicted of robbery in 1996. 683 F.3d 1304, 1311-1312. The court assumed that it did not and concluded that petitioner's robbery conviction nevertheless qualified as an ACCA predicate under the residual clause. *Id.* at 1313-1314. On remand, the court of appeals should consider, in the first instance, whether the elements clause is satisfied.

A. In his pro se petition for a writ of certiorari, petitioner contends (Pet. 5) that he was convicted of "[r]obbery by sudden snatching" in violation of Fla. Stat. Ann. § 813.131 (West 2006), which prohibits "the taking of money or other property from the victim's person, with intent to permanently or temporarily deprive the victim or the owner of the money or other property, when, in the course of the taking, the victim was or became aware of the taking." Under the

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to file a second or successive application not later than 30 days after the filing of the motion").

"[r]obbery by sudden snatching" statute, "it is not necessary to show that * * * [t]he offender used any amount of force beyond that effort necessary to obtain possession of the money or other property" or that "[t]here was any resistance offered by the victim to the offender or that there was injury to the victim's person." *Id.* § 813.131(1)(a) and (b).

Petitioner, however, was not convicted under the "sudden snatching" statute he cites—that statute was not even enacted until 1999. See 683 F.3d at 1311. Rather, petitioner was convicted in 1996 under the Florida robbery statute, Fla. Stat. Ann. § 813.13(1) (West 2006), which criminalizes "the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear." See J.A. 187a; PSR ¶ 27.

B. Under the ACCA's elements clause, a prior conviction punishable by a term exceeding one year of imprisonment is a violent felony if the crime "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i)). The force required by the elements clause is "force capable of causing physical pain or injury to another person." See *Curtis Johnson* v. *United States*, 559 U.S. 133, 140 (2010). In *Robinson* v. *State*, 692 So. 2d 883 (1997), the Florida Supreme Court explained (a few months after petitioner's robbery conviction) that "in order for the snatching of property from another to amount to robbery" under Florida's robbery statute, "the perpetra-

tor must employ more than the force necessary to remove the property from the person"—there must be "resistance by the victim that is overcome by the physical force of the offender." *Id.* at 886. Furthermore, the fear contemplated by the Florida robbery statute is "the fear of death or great bodily harm." *United States* v. *Lockley*, 632 F.3d 1238, 1242 (11th Cir.) (quoting *Magnotti* v. *State*, 842 So. 2d 963, 965 (Fla. Dist. Ct. App.), review denied, 857 So. 2d 196 (Fla. 2003) (Tbl.)), cert. denied, 132 S. Ct. 257 (2011).

In *Robinson*, the Florida Supreme Court noted that, in the decision below, *Robinson* v. *State*, 680 So. 2d 481 (Fla. Dist. Ct. App. 1996), the First District Court of Appeals had relied on a decision in *Andre* v. *State*, 431 So. 2d 1042 (Fla. Dist. Ct. App. 1983), to support the proposition that robbery requires no more force than is necessary to remove property from a person who does not resist. 692 So. 2d at 886. In *Andre*, the Fifth District Court of Appeals had relied upon the Florida Supreme Court's statement in *McCloud* v. *State*, 335 So. 2d 257 (1976), that "any degree of force suffices to convert larceny into robbery." *Id.* at 258-259; see *Robinson*, 692 So. 2d at 886.

In overturning the lower court's decision, the Florida Supreme Court explained that the First and Fifth District Courts of Appeal had misconstrued *McCloud*, which must be understood within the factual context of that case. *Robinson*, 692 So. 2d at 886. *McCloud* involved a defendant who "gained possession of his victim's purse by exerting physical force to extract it from her grasp," and "the victim released the strap only after she fell to the ground." See *ibid.* The Florida Supreme Court explained that *McCloud* supports the proposition that robbery requires more force than

is necessary to remove property from another person. *Ibid.* (stating that the Court's holding was "[i]n accord with our decision in *McCloud*"). The court cited several cases and other sources demonstrating that Florida law contains a longstanding requirement that robbery must involve "resistance by the victim that is overcome by the physical force of the offender," notwithstanding a few intermediate court of appeals opinions suggesting that additional force was not required. *Ibid.*[11]

C. Now that the residual clause has been invalidated, the court of appeals will need to decide the question left open in petitioner's direct appeal—whether Florida robbery is a violent felony under the ACCA's elements clause. 683 F.3d at 1311-1314. Cf. *Lockley*, 632 F.3d at 1245 (holding that Florida robbery is a crime of violence under the elements clause of the career-offender sentencing guideline). Because the court of appeals upheld petitioner's conviction under the residual clause, and because the courts below have not yet analyzed in petitioner's case whether the Florida robbery statute is a violent felony under the elements clause (and was at the time of petitioner's robbery conviction in 1996), that issue should be addressed in the first instance by the court of appeals.

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[11] None of those cases arose in the Fourth District Court of Appeals, where petitioner was convicted. See *Welch*, 683 F.3d at 1311 & n.32.

CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 922 provides in pertinent part:

Unlawful acts

* * * * *

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition

which has been shipped or transported in interstate or foreign commerce.

* * * * *

2. 18 U.S.C. 924 provides in pertinent part:

Penalties

* * * * *

(a)(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (*o*) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

* * * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * * * *

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GREGORY WELCH,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

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INTRODUCTION

Johnson is a substantive rule under this Court's test for a simple reason: No matter what procedures the sentencing court employed, it could not impose the punishment that Petitioner received under the residual clause. If no change in a court's procedures could save the court's ultimate judgment, the rule relied upon to attack that judgment cannot be said to "regulate only the *manner of determining* the defendant's culpability." *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004). Instead it is a rule of substantive criminal law—the law that "declares what conduct is criminal and prescribes the punishment to be imposed for such conduct." 1 Wayne L. LaFave, *Substantive Criminal Law* § 1.2, at 11 (2003). *Johnson* is one of the clearest examples of such a rule: It changed the permissible outcomes in a criminal proceeding from one range (15 to life) to a wholly distinct range (0 to 10), meaning that *any* person whose enhanced sentence depended upon the residual clause is facing a penalty that could not have been imposed. The recognition of such rules as substantive goes to the heart of habeas corpus: To provide relief for persons whose confinement is not authorized by law.

Ignoring the Court's simple and principled framework, Amicus offers a new framework that looks to whether the "source" of a given constitutional rule is "substantive" because it renders certain conduct "constitutionally immune from punishment." Amicus Br. 1, 21-22. In direct conflict with that test, this Court has given retroactive effect to rules that do not involve any constitutionally immune conduct, *see, e.g.*, *Bousley*

v. United States, 523 U.S. 614, 620-21 (1998); Pet. Br. 30-32, 34-35 (citing additional cases), and has denied retroactive effect to rules that are based on substantive constitutional guarantees, *see, e.g.*, *Sawyer v. Smith*, 497 U.S. 227 (1990) (rule based on Eighth Amendment). Perhaps for that reason, Amicus at times extends her "source" test to encompass constitutional rules that do not render any conduct immune from punishment, such as those based on equal protection—leaving no clear principle to distinguish which sources are procedural and which are substantive.

Even stretched in this manner, Amicus's "source" test cannot account for several well-settled cases and requires an addendum for rules adopted "in furtherance of congressional intent." Amicus Br. 40. Like the "source" test, however, this addendum has nothing to do with whether a person is or is not unlawfully confined. Although Amicus justifies the inquiry into "congressional intent" in terms of special separation-of-powers concerns, a court that imposes a penalty not authorized by any lawful statute exceeds its judicial power at least as much as a court that exceeds the intended scope of a valid statute. Furthermore, giving retroactive effect to rules that narrowly interpret a substantive criminal statute, but not to rules that invalidate the statute, would lead to a highly anomalous result: A decision interpreting a statute to *avoid* vagueness would be retroactive, *see, e.g.*, *Skilling v. United States*, 561 U.S. 358, 368 (2010) (construing a substantive criminal statute narrowly to avoid "a vagueness shoal"), but a decision that goes the additional step of finding the law "'so standardless'"

that it must be invalidated, *see id.* at 415-16 (Scalia, J., concurring), would not.

Since *Johnson* was decided nine months ago, district courts in at least seven circuits have been releasing or resentencing persons under *Johnson* on collateral review. Contrary to Amicus's warnings, the sky has not fallen. And Amicus's argument that those remaining in prison should be required to stay beyond the lawful statutory maximum for their offense—because they had "fair notice" or because *Johnson* may affect other statutes—is an attack on *Johnson* itself, which firmly rejected each of those contentions, not on *Johnson*'s retroactivity.

Retroactivity doctrine serves the fundamental purpose of identifying when a person is facing confinement that was not authorized by the substantive criminal law—an inquiry that has nothing to do with the "source" of a rule or whether Congress *meant* to subject that person to unlawful confinement. *See, e.g.*, *Ex parte Yarbrough*, 110 U.S. 651, 654 (1884). This Court has never in its history held that habeas relief may be denied to a person whose punishment was authorized by an unconstitutional law who properly sought such relief, and it should not do so now.

ARGUMENT

I. The Standards Adopted By This Court, Together With Amicus's Concessions, Dictate That *Johnson* Is Substantive, Not Procedural.

Amicus's brief misconceives this Court's retroactivity jurisprudence. To begin with, although Amicus repeatedly asserts that *Teague* created a general bar to retroactivity, subject to "two narrow exceptions," Amicus Br. 1, 12, 18, 49, this Court has repudiated that understanding, *see, e.g.*, *Schriro*, 542 U.S. at 352 n.4. Under this Court's precedents, *Johnson* is retroactive unless Amicus can show that it falls within *Teague*'s "bar on retroactive application of procedural rules." *Id.*

1. "Procedural rules," this Court recently explained, are those that "enhance the accuracy of a conviction or sentence by regulating 'the *manner of determining* the defendant's culpability.'" *Montgomery v. Louisiana*, 136 S. Ct. 718, 730 (2016) (quoting *Schriro*, 542 U.S. at 353). Accordingly, the Court applies a simple test to determine whether a rule is procedural: If a court had employed "'impeccable factfinding procedures'" and "flawless sentencing procedures," would the judgment reached be a permissible outcome? *Id.* (quoting *United States v. U.S. Coin & Currency*, 401 U.S. 715, 724 (1971) (Harlan, J.)). If yes, the rule is procedural and subject to *Teague*'s bar, unless it is a "watershed" rule.

Amicus does not dispute that by holding the residual clause facially unconstitutional, *Johnson* barred any court from imposing punishment under it, no matter what procedures the court employs. Amicus

Br. 24-25. Based on that concession alone, *Johnson* cannot be a "procedural" rule. Amicus's conclusion that *Johnson* is "procedural" must instead turn on the novel notion that "procedural rules" are those grounded in "process-based values," Amicus Br. 14—a notion that lacks any relation to the purposes of habeas review and is unworkable, *see infra* Part II.

2. It is equally clear under this Court's retroactivity jurisprudence that *Johnson* is a substantive rule. That definition is also straightforward: "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 353.[1] "Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." *Id.* at 352 (quoting *Bousley*, 523 U.S. at 620); *Montgomery*, 136 S. Ct. at 734. Amicus does not dispute that *Johnson* "necessarily carr[ies] a significant risk" that a defendant is imprisoned without the authority of a valid statute. Indeed, she does not once mention the Court's "significant risk" standard, which flatly contradicts her assertion that an "effects-based analysis is inappropriate" when assessing a rule's retroactivity. Amicus Br. 41 n.9. Because *Johnson* altered the lawful

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[1] Amicus asserts that this definition is merely an "out-of-context fragment[]" because it makes no reference "to congressional intent." Amicus Br. 42. But this Court has never suggested that the character of a rule turns on "congressional intent"—a restriction that would be arbitrary and unworkable, *see infra* Part II.C.

range of sentences for persons whose sentences depended on the residual clause—from 15 years' to life imprisonment, to 0 to 10 years' imprisonment—those persons necessarily "face[d] a punishment that the law cannot impose." *Schriro*, 542 U.S. at 352. Accordingly, *Johnson* is a substantive rule of criminal law.

Amicus argues that the Court's framework would lead to retroactivity "*whenever* [this Court] deems a law 'unconstitutional.'" Amicus Br. 16, 34. That is wrong. Under the principles above, only the narrowing or invalidation of "*a substantive federal criminal statute*"—i.e., a statute that defines the criminal proscriptions and/or punishments to which persons are subject—is retroactive. *Bousley*, 523 U.S. at 620 (emphasis added); *Montgomery*, 136 S. Ct. at 731 ("A penalty imposed *pursuant to an unconstitutional law* is no less void because the prisoner's sentence became final before the law was held unconstitutional." (emphasis added)). Such rules go directly to "the doctrinal underpinnings of habeas review," which serve to ensure that there is some valid legal basis for a person's ongoing confinement. *Bousley*, 523 U.S. at 621. The invalidation of a criminal statute that governs trial procedure, on the other hand, is procedural and nonretroactive. *See, e.g.*, *Schriro*, 542 U.S. at 354 (invalidation of law requiring judge to find aggravating factors is procedural because "the range of conduct punished by death in Arizona was the same before .. as after").[2]

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[2] Indiana's amicus brief incorrectly suggests that retroactivity will somehow affect AEDPA's procedural requirements. *See* Br. of

In arguing that *Lambrix v. Singletary*, 520 U.S. 518 (1997), is inconsistent with the principles above, Amicus misstates the facts of *Lambrix* and *Espinosa v. Florida*, 505 U.S. 1079 (1992). Both cases involved Florida's death penalty scheme, under which a jury was instructed to weigh statutory aggravating and mitigating circumstances and then render an "advisory sentence" of life imprisonment or death. *Lambrix*, 520 U.S. at 525-26. Whether a jury recommended life or death, the trial court then conducted an independent weighing of the aggravating and mitigating circumstances, giving "great weight" to the jury's advisory sentence. *Id.* In both *Espinosa* and *Lambrix*, the trial court had imposed death based on an appropriately narrowed construction of the "especially heinous, atrocious, or cruel" aggravating factor. *Id.* at 526, 532 & n.4; *Espinosa*, 505 U.S. at 1082. *Espinosa* held that failure to instruct the jury as to the narrowing construction of the aggravating factor "tainted the trial court's sentence because the trial court gave deference to the jury verdict." *Lambrix*, 520 U.S. at 528. Thus, *Espinosa did not* "invalidate[] an aggravating factor," Amicus Br. 28; it held that an improperly instructed jury's recommendation might indirectly affect a trial court's conclusion that death—a concededly lawful outcome—was appropriate. *Lambrix*, 520 U.S. at 525-28. Because the error in

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Indiana et al. 12-13. A claim seeking the benefit of a retroactive rule is equally subject to AEDPA's procedural hurdles, including, in the case of state prisoners, exhaustion of state remedies and demonstrating a violation of "clearly established" federal law under 28 U.S.C. § 2254(d)(1).

Espinosa concerned only the processes for reaching the trial court's ultimate determination, and not the defendant's eligibility for the punishment he received notwithstanding those processes, *Lambrix* held that *Espinosa* was a procedural rule that is not retroactive. *Id.* at 539.

This Court's precedents thus dictate that *Johnson* is a substantive rule that should apply retroactively.

II. The Court Should Not Abandon Its Straightforward and Principled Approach In Favor Of Amicus's Novel "Source" And "Congressional Intent" Tests.

Amicus's proposal would abandon the Court's principled approach and determine whether a rule is "substantive" based on an inquiry that has nothing to do with whether a person's punishment was authorized by a "substantive federal criminal statute." *Bousley*, 523 U.S. at 620. Instead, Amicus's test is based on "the constitutional *source*" of a new rule. Amicus Br. 30. To apply this test, one must identify the "source" of a constitutional rule (at some undefined level of generality) and then determine whether that particular provision of the Constitution (or subpart thereof) represents a "substantive categorical guarantee"—perhaps, though not necessarily, because it renders certain conduct "constitutionally immune from punishment." *Id.* at 1, 14, 21-22. However, because this "source" test cannot accommodate several of this Court's settled precedents, Amicus devises an ad hoc "separate subcategory" for rules adopted "in furtherance of congressional intent," which would automatically be deemed "substantive." *Id.* at 40.

A. The "Source" Test Has No Foundation In Principles Or Precedents Related To Habeas Corpus.

Amicus derives the "source" test principally from a passage in Justice Harlan's *Mackey* opinion explaining that nonretroactivity would be appropriate only in the case of certain "'procedural due process' rules," as opposed to "'substantive due process' rules." *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring); Amicus Br. 20. However, Justice Harlan specifically defined the "'procedural due process' rules [he had] in mind," as a class of rules whose defining feature was not their source, but that they were "*applications* of the Constitution *that forbid the Government to utilize certain techniques or processes* in enforcing concededly valid societal proscriptions on individual behavior." *Mackey*, 401 U.S. at 692 (emphasis added). Moreover, Justice Harlan explained, the same rule can "have both procedural and substantive ramifications, as [he] ha[d] used those terms," *id.* at 692 n.7—a notion that is incompatible with Amicus's contention that a rule's character turns on its source, not on its effects.

Indeed, the "source" test directly conflicts with the outcomes Justice Harlan reached in *Mackey* and in *United States v. U.S. Coin & Currency*, 401 U.S. 715 (1971), which were decided on the same day. Both cases involved the same new rule—that the government cannot compel a person to report gambling activities through the tax law—which stemmed from the same "source," the Fifth Amendment right against self-incrimination. In *Coin & Currency*, the defendant

claimed that this rule rendered unlawful his conviction for failing to report gambling activities. 401 U.S. at 716-17. Writing for the Court, Justice Harlan held the rule retroactive because the claim was not "concerned with the implementation of a procedural rule," but with punishment that could not be imposed in the first place. *Id.* at 723-24. In *Mackey*, the petitioner invoked the same rule to argue that his tax returns should have been excluded at trial. 401 U.S. at 701. There, Justice Harlan concluded that retroactivity was *not* warranted because the rule concerned only "the procedures utilized in procuring [the] conviction." *Id.* It is difficult to imagine a better controlled experiment to refute the hypothesis that a rule's retroactivity depends on its source rather than its effect.

Although Amicus repeatedly states that this Court's post-*Teague* cases have "consistently focused on the constitutional source of a new rule," that is incorrect. Amicus Br. 14, 30. To the contrary, in *Teague*, the Court discarded the approach to retroactivity it had adopted in *Linkletter v. Walker*, 381 U.S. 618 (1965), which turned on an "examin[ation of] the purpose" underlying a rule and gave rise to arbitrary and inconsistent results. *Teague v. Lane*, 489 U.S. 288, 302-03 (1989). The Court explained that "'[t]he relevant frame of reference . . . is *not the purpose of the new rule whose benefit the [defendant] seeks*, but instead the purposes for which the writ of habeas corpus is made available.'" *Id.* at 306 (quoting *Mackey*, 401 U.S. at 682 (alteration in original)).

The only post-*Teague* citation Amicus offers to support her "source" test is a single sentence from

Schriro that does not actually support her proposition. Amicus Br. 43. In *Schriro*, this Court reasoned that *Ring v. Arizona*, 536 U.S. 584 (2002), "did not alter the range of conduct Arizona law subjected to the death penalty" because "[i]t could not have; it rested entirely on the Sixth Amendment's jury-trial guarantee, a provision that has nothing to do with the range of conduct a State may criminalize." 542 U.S. at 353. Contrary to Amicus's inference, this reasoning confirms that a rule's retroactivity turns on whether its effect is to alter the range of circumstances subject to penalty. The Court's reasoning that *Ring* did not have that effect because the constitutional right upon which it relied "could not" have that effect is unremarkable. Here, on the other hand, no one disputes that *Johnson* facially invalidated the residual clause, changing the permissible range of punishment from 15 years to life to 0 to 10 years.

The few post-*Teague* cases addressing rules grounded in the Due Process Clause also contradict Amicus's assertion that retroactivity turns on whether such rules are grounded in procedural or substantive due process. In *Goeke v. Branch*, 514 U.S. 115 (1995) (per curiam), for instance, the Eighth Circuit had granted habeas on the basis that Missouri's fugitive dismissal law "violated the defendant's substantive rights under the Fourteenth Amendment." 514 U.S. at 117. Assuming the legitimacy of that substantive due process rule, this Court reversed, holding that it was

procedural under *Teague* and thus not retroactive—a result that cannot be squared with Amicus's test.[3]

Indeed, this Court's post-*Teague* cases confirm that a rule's "source" need not even lie within the Constitution. *Bousley*, 523 U.S. at 620-21. What unifies all substantive rules is their particular "ramification": They "necessarily carry a significant risk" that a defendant suffered a punishment that could not have been lawfully imposed upon him. *Id.* That, the Court has explained, is why conduct-protecting rules are classified as substantive and also why rules "holding that a substantive federal criminal statute does not reach certain conduct" are substantive. *Id.* It is why *Johnson*—which altered the lawful range of punishment from 15 years to life to 0 to 10 years—is substantive as well. *See id.*; *Schriro*, 542 U.S. at 351-52.

B. Amicus Cannot Offer A Coherent Theory For Discerning Which "Sources" Produce Substantive Rules.

Amicus proceeds as though the distinction between a procedural and a substantive "source" is self-evident, offering little direction as to how the Court would sort between the two. In fact, this approach would require

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[3] None of the remaining post-*Teague* cases addressing rules grounded in the Due Process Clause considered relevant whether the rule derived from substantive or procedural due process. They instead considered whether the rule had the effect of "'decriminaliz[ing]' any class of conduct" or preventing certain punishment. *Gilmore v. Taylor*, 508 U.S. 333, 345 (1993); *Gray v. Netherland*, 518 U.S. 152, 170 (1996); *O'Dell v. Netherland*, 521 U.S. 151, 156-57 (1997).

the Court to overrule well-settled case law and create new, arbitrary distinctions between constitutional rights.

At several points, Amicus suggests that the "source" inquiry is simple: Does a given constitutional provision "place[] 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'"? *Teague*, 489 U.S. at 307 (quoting *Mackey*, 401 U.S. at 692-93); *see* Amicus Br. 1, 12-13, 44. This theory rests on an implausibly narrow reading of Justice Harlan's opinions, *see* Pet. Br. 29-35, and, like the "source" test itself, it is irreconcilable with this Court's recognition that decisions narrowing a substantive criminal statute's scope are retroactive. *Bousley*, 523 U.S. at 620-21. Adopting Amicus's rule would entail overruling a heap of other cases as well.

For example, this Court has held that numerous rules grounded in the Eighth Amendment are not retroactive because they affect only trial procedures. *See, e.g.*, *Saffle v. Parks*, 494 U.S. 484, 494-95 (1990); *Sawyer*, 497 U.S. 227; *Graham v. Collins*, 506 U.S. 461 (1993); *Lambrix*, 520 U.S. 518; *Beard v. Banks*, 542 U.S. 406 (2004). Faithfully applied, Amicus's test would hold that these rules—whose source is undoubtedly a substantive guarantee—are retroactive. The same problem arises regarding other constitutional rights that place conduct beyond the government's power to proscribe. *See, e.g.*, *supra* 9-10 (discussing the contrasting results of *Mackey* and *Coin & Currency*); *Dawson v. Delaware*, 503 U.S. 159, 160 (1992)

(admission of evidence of gang membership at capital sentencing barred by First Amendment).

Perhaps for this reason, at other points in her brief, Amicus does not adhere to the "power to proscribe" interpretation of her "source" rule. For instance, Amicus takes for granted that certain Eighth Amendment rules would be found "procedural" in source. *See* Amicus Br. 29, 31. But how is one to determine whether the relevant facet of a quintessential substantive protection, like the right against cruel and unusual punishment, is a "procedural" source? Logically, the answer should be by asking whether the rule has the effect of regulating "only the *manner of determining* the defendant's culpability," *Schriro*, 124 U.S. at 353—a principle that Amicus cannot adopt because it would amount to abandoning the "source" test altogether.

This fundamental problem with Amicus's "source" test is also demonstrated by her arbitrary assessment that certain constitutional rights have a substantive "source" even though they do not make any conduct immune from regulation. The Equal Protection Clause, for instance, does not place conduct beyond the power of the state to criminalize, provided that the state exercises its power evenhandedly—a point that both Petitioner and the Government made and Amicus does not dispute. Pet. Br. 34; US Br. 34. If Amicus were true to her "power to proscribe" theory, she would thus conclude that equal-protection-based rules cannot be substantive. Yet Amicus insists, without explanation, that cases like *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Crowley v. Christensen*, 137 U.S. 86 (1890),

involved the "*substantive* right to equal protection." Amicus Br. 45.

Many other constitutional provisions also protect individual rights not by limiting *what* conduct the government may proscribe but by regulating *how* it may do so. *See, e.g.*, U.S. Const. art. I, § 9, cl. 3 (ex post facto); *id.* (bill of attainder); *id.* amend. V (double jeopardy). Which of these other provisions would Amicus selectively recognize as substantive in "source"?

Amicus's theory also conflicts with *Ex parte Siebold*, 100 U.S. 371 (1880), which, this Court recently explained, "addressed why substantive rules must have retroactive effect regardless of when the defendant's conviction became final." *Montgomery*, 136 S. Ct. at 730; *see Mackey*, 401 U.S. at 693 n.8. Although Amicus suggests that *Siebold* involved Congress's power to proscribe conduct, Amicus Br. 44-45, the *Siebold* petitioners *conceded* that their underlying conduct—"the offence commonly known as 'stuffing the ballot-box'"—was not constitutionally protected conduct. 100 U.S. at 379. They argued only that the statute of conviction was unconstitutional because the Elections Clause did not give Congress the "power to make partial regulations" governing elections. *Id.* at 382. By reading Justice Harlan's category of substantive rules as limited to constitutional immunities, Amicus implies that Justice Harlan sought to overturn the very historical precedent upon which he relied—and upon which this Court recently relied, notwithstanding the

same criticisms Amicus raises here. *See Montgomery*, 136 S. Ct. at 748-49 (Thomas, J., dissenting).[4]

The difficulties in applying the "source" test are manifest here. Contrary to Amicus's assertions, it is far from clear that vagueness is rooted in "process-based values." Amicus Br. 14. While Amicus attempts to reduce vagueness to a right to "notice," *id.* at 25-26, this Court has repeatedly said otherwise: "[T]he more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith v. Gougen*, 415 U.S. 566, 574 (1974)); *see also* M. Cherif Bassiouni, *Substantive Criminal Law* 55 (1978). Vagueness doctrine affords the substantive guarantee that persons will not be deprived of "life, liberty, or property under a criminal law ... so standardless that it

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[4] Amicus's attempt to discount historical precedents is unavailing. For example, she cites this Court's statement in *Montgomery* that *Siebold* "does not directly control," Amicus Br. 48, but that statement was made with respect to the jurisdictional issue in *Montgomery*, which *Siebold* (a federal case) could not have addressed. *See* 136 S. Ct. at 731. More broadly, the extensive historical record recounted in Petitioner's opening brief establishes that habeas has always been open to claims of the kind at issue here without regard to retroactivity. Pet. Br. 30-32 & n.12. The limit on retroactivity urged by Justice Harlan and adopted in *Teague* was, as Amicus acknowledges, a response to the recognition of new procedural protections "in the 1950's and 1960's" (Amicus Br. 19), which gave rise to claims that historically would not have been cognizable in habeas at all. It was not intended to take away the core instances for which "the writ has historically been available," *Mackey*, 401 U.S. at 682-83, 692-93.

invites arbitrary law enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015); *see Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) ("the substantive due process guarantee protects against government power arbitrarily and oppressively exercised").

This more complete understanding of vagueness doctrine makes Amicus's distinction between equal protection and vagueness untenable: If a right precluding administration of the law "with an evil eye and an unequal hand" (*Yick Wo*, 118 U.S. at 373-74) is a substantive "source," why not a right precluding administration in a manner that is "so standardless that it invites arbitrary enforcement" (*Johnson*, 135 S. Ct. at 2556)? *See also* 1 LaFave, *supra*, § 2.3(c), at 150 ("The objection to a vague statute, then, is akin to a claim of denial of equal protection in law enforcement[.]"). This distinction is particularly difficult to comprehend in the context of the Fifth Amendment's Due Process Clause, which is the source of both equal protection and vagueness challenges to federal laws.

In sum, Amicus's rigid "constitutional immunity" formulation cannot account for this Court's precedent and, upon abandoning it, she leaves the Court with no discernible rule for distinguishing between substantive and procedural sources at all.

C. The "Congressional Intent" Test Similarly Lacks Any Basis In Principle Or Precedent And Would Lead To Arbitrary Outcomes.

In *Bousley* and in *Schriro*, the Court made perfectly clear why a decision narrowing the scope of a criminal

statute is a substantive rule: It alters the substantive criminal law. *Bousley*, 523 U.S. at 620-21; *Schriro*, 542 U.S. at 353. Amicus cannot accept that account, however, because it would plainly dictate that *Johnson* is substantive as well. *See supra* Part I.

Instead, Amicus says that statutory holdings are retroactive because they are "in furtherance of congressional intent." Amicus Br. 40. This Court has never adopted this rationale—in fact, it does not appear that *any* court has adopted this rationale. That is for good reason: When a person is subject to confinement that is not authorized by a valid law, that confinement is unlawful irrespective of what Congress *meant* to do.

Amicus justifies her "congressional intent" subcategory on the basis of a special "separation-of-powers" rationale. Amicus Br. 40. But the separation-of-powers concerns implicated when a court imposes punishment that exceeds the scope of a valid statute are no greater than when a court imposes punishment that is not authorized by *any* valid statute. *See Bousley*, 523 U.S. at 620-21 ("[I]t is only Congress, and not the courts, which can make conduct criminal."). Indeed, separation-of-powers concerns are particularly acute in the context of vagueness. *See, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (explaining that "[a] vague law impermissibly delegates basic policy matters" to courts); *Kolender*, 461 U.S. at 358 n.7.

Amicus's "congressional intent" test also yields untenable results. "[B]efore striking a federal statute as impermissibly vague, [the Court] consider[s]

whether the prescription is amenable to a limiting construction." *Skilling*, 561 U.S. at 405. In *Skilling*, for example, the Court avoided invalidating the honest-services statute on vagueness grounds by limiting the statute to its "core" conduct of "*at least* bribes and kickbacks." *Id.* at 408. Under Amicus's theory, *Skilling* (unlike *Johnson*) would thus be a substantive rule, because it "interpreted" the statute rather than invalidating it. Yet that would be anomalous. It would mean that so long as the Court leaves one application standing, narrowing a statute will have retroactive effect and all persons outside the "core" will be eligible for relief; but if the Court goes further and invalidates even the final core application (as three Justices would have done in *Skilling*), its holding will *not* be retroactive to those very same people. Such arbitrariness is untenable.

Additional problems with Amicus's "congressional intent" test are apparent from her use of it as a catch-all for non-statutory decisions that she cannot otherwise account for. As Petitioner's opening brief explains, the Court has always granted habeas relief to persons whose punishment could not constitutionally have been imposed, regardless of whether the constitutional rule was settled when their convictions became final. Pet. Br. 32. In *In re Medley*, 134 U.S. 160 (1890), for instance, the Court granted habeas relief to a prisoner who had been sentenced to solitary confinement because that punishment violated the Ex Post Facto Clause. Amicus claims, without explanation, that such cases are justified under the 'congressional intent' test. Amicus Br. 46 n.10. That

characterization of *Medley* is implausible: The Court specifically held that the punishment "to which the prisoner was subjected by the statute of Colorado ... is forbidden by this provision of the constitution of the United States." 134 U.S. at 171. In Amicus's terms, therefore, the Court "recognized [Colorado's] intent but *overrode* it." Amicus Br. 41. The arbitrary classification of such decisions further confirms the indeterminacy of Amicus's system.

III. Amicus Overstates The Consequences Of Concluding That *Johnson* Is Retroactive.

Since *Johnson* was decided nine months ago, the First, Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have been releasing or resentencing persons under *Johnson* on collateral review. *See* Pet. Br. 11 nn.3-4. Those circuits alone accounted for approximately 70% of ACCA-enhanced defendants in 2014.[5] In many cases, petitioners and the government have simply filed joint emergency motions for relief, leading to prompt release from unlawful confinement or resentencing.[6] *See also* Amicus Br. of Scholars of Fed. Courts 27-33 (describing the limited burden caused by *Johnson*'s retroactivity). Contrary to Amicus's warning, the sky has not fallen.

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[5] U.S. Sentencing Comm'n, *"Crime of Violence" and Related Issues Public Data Briefing*, at 27 (Nov. 10, 2015), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20151105/COV_briefing.pdf.

[6] *See* Petition for Writ of Habeas Corpus 12-13, *In re Sharp*, No. 15-646 (U.S. Nov. 16, 2015) (citing numerous examples across these circuits).

Amicus argues that persons who have not yet been afforded relief under *Johnson* should be required to carry out sentences exceeding the lawful statutory maximum for their offense because affording them relief would lead to "problematic consequences." Amicus Br. 49. The implications of that argument are extremely troubling. Society has no interest "in permitting the criminal process to rest at a point where it ought properly never to repose." *Montgomery*, 136 S. Ct. at 732 (quoting *Mackey*, 401 U.S. at 693).

In any case, Amicus's arguments are an attack on *Johnson* itself, not its retroactivity. First, Amicus argues that "many" of the predicate convictions to which the residual clause was applied did not involve the "notice problems at issue in *Johnson*." Amicus Br. 50. But that contradicts *Johnson*, which invalidated the residual clause precisely because it was "shapeless," "'nearly impossible to apply,'" and "'at best could be only guesswork.'" 135 S. Ct. at 2560. Moreover, the same decisions of this Court that Amicus relies upon to show "fair notice," Amicus Br. 50, were described by *Johnson* as "confirm[ing] its hopeless indeterminacy," "offer[ing] no help at all," and leaving "'a black hole of confusion and uncertainty.'" 135 S. Ct. at 2558, 2562. Furthermore, the Court explained that the "easy" examples cited by the dissent, and echoed by Amicus here, in fact "turn out not to be so easy after all." *Id.* at 2560-61.

Second, Amicus argues that *Johnson* might be applied to strike down other statutes, citing the same statutes that the government and dissent cited in *Johnson* itself—an argument that the Court, again,

rejected. *Id.* at 2561 (distinguishing such statutes because they do not tie the standard "to a confusing list of examples" or "to an idealized ordinary case of the crime").[7]

IV. The Court Should Reject Amicus's Attempt To Assert Nonjurisdictional Defenses On Behalf Of The Government.

A. Amicus's Procedural Default Argument Is Meritless.

Amicus argues that the Court should affirm on the basis of procedural default—a nonjurisdictional affirmative defense, *Trest v. Cain*, 522 U.S. 87, 89 (1997), that the government has waived in this case. That would be an extraordinary departure from this Court's precedent.

Petitioner argued vagueness in his *pro se* § 2255 motion, in several *pro se* filings on appeal, and in his

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[7] Amicus exaggerates the degree to which *Johnson*'s retroactivity entails the same for the career offender guidelines. Several circuits have held, as a threshold matter, that vagueness does not even apply to the sentencing guidelines. *See, e.g.*, *United States v. Matchett*, 802 F.3d 1185, 1189 (11th Cir. 2015); *United States v. Tichenor*, 683 F.3d 358, 363-66 (7th Cir. 2012). And, with respect to retroactivity, some courts have distinguished the guidelines because "[u]nlike the ACCA—a statute that shifts the defendant's penalty range and minimum and maximum terms of imprisonment—the Guidelines merely guide the execution of a court's discretion in selecting the appropriate sentence from within an otherwise stagnate range of lawful penalties." *Frazier v. United States*, Nos. 1:14-CV-134-CLC, 2016 WL 885082, at *5-6 (E.D. Tenn. Mar. 8, 2016), *appeal docketed*, No. 16-5299 (6th Cir. Mar. 15, 2016).

certiorari briefing, Pet. Br. 7-10, and the government made the deliberate decision not to assert procedural default at each stage—and, again, in its merits brief before this Court. In light of that deliberate waiver, this Court lacks authority to raise the defense *sua sponte*. *See Wood v. Milyard*, 132 S. Ct. 1826, 1833-34 (2012).

Even had the government asserted this defense, Petitioner would be excused from any default based on *both* (1) cause and prejudice, *see Reed v. Ross*, 468 U.S. 1, 17 (U.S. 1984) (cause is satisfied when a new rule comes by way of a "decision of this Court" that "explicitly overrule[s] one of [its] precedents"), *and* (2) the actual innocence gateway, *see Bousley*, 523 U.S. at 623; Leah M. Litman, *Residual Impact: Resentencing Implications of* Johnson*'s Potential Ruling on ACCA's Constitutionality*, 115 Colum. L. Rev. Sidebar 55, 72 (2015) (courts have "generally coalesced around the idea that a defendant would be actually innocent if a sentencing error resulted in the defendant receiving a sentence above the statutory maximum").

B. Amicus's Elements Clause Argument Is Meritless.

Amicus's argument that the Court can affirm under the elements clause is also unfounded. The government does not contest that it failed to raise this nonjurisdictional issue at the certiorari stage. *See* Pet. Br. at 35-36. Moreover, reasonable jurists could debate whether Petitioner's 1996 Florida robbery convictions qualify under the elements clause. The Eleventh Circuit conceded as much when, on direct appeal, it reviewed Florida law at the time of Petitioner's

convictions and concluded that "[a]rguably the elements clause would not apply." JA 117a.

In any case, Petitioner's Florida robbery convictions do not qualify under the elements clause because they did not require as an element the use of "violent force." *Johnson (Curtis) v. United States*, 559 U.S. 133, 140-41 (2010). As the Eleventh Circuit observed and the government conceded at sentencing, Petitioner was convicted "at a time when the controlling Florida Supreme Court authority held that 'any degree of force'" sufficed to commit robbery, including the mere snatching of an object from a victim's person without any resistance. JA 113a-115a & n.32 (explaining that in the district where Petitioner was convicted the force could be "ever so little"); JA 152a. In other cases, the government has conceded that this form of Florida robbery cannot qualify under the elements clause. *See* Government's Response to § 2255 Motion, at 9-10, *Dieujuste v. United States*, No. 9:15-cv-80618-KLR (S.D. Fla. Aug. 31, 2015), ECF No. 17.

Amicus's argument is premised on *Robinson v. State*, 692 So. 2d 883 (Fla. 1997), which held that robbery can be committed only upon a showing of "resistance by the victim." *Id.* at 886. As the Eleventh Circuit explained on direct appeal, however, *Robinson* was decided after Petitioner's convictions and altered prior controlling authority that "any degree of force" sufficed. JA 113a-115a. In any case, even after *Robinson*, Florida robbery does not require violent force. *See, e.g.*, *Sanders v. State*, 769 So. 2d 506, 507 (Fla. 5th Dist. Ct. App. 2000) (force required to quickly open a victim's hand and snatch cash is sufficient); Pet.

Br. 37 (explaining additional ways in which a conviction for Florida robbery can be obtained without violent force).

Plainly, at a minimum, reasonable jurists could debate whether Petitioner's 1996 Florida robbery convictions qualify under the elements clause and therefore reversal is warranted.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

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No. 15-6418

In the Supreme Court of the United States

GREGORY WELCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Amicus curiae in support of the judgment below contends that the classification of a new constitutional rule as "substantive" (and therefore retroactively applicable to cases on collateral review) or "procedural" (and therefore not retroactively applicable unless it is a "watershed" procedural rule), see *Teague* v. *Lane*, 489 U.S. 288, 310-314 (1989) (plurality opinion), depends on the constitutional source of the legal right underlying the new rule, rather than its effect. Brief of the Court-Appointed *Amicus Curiae* (Amicus Br.) 24-33. Applying that rationale, *amicus* contends (Br. 27-30) that the holding of *Johnson* v. *United States*, 135 S. Ct. 2551 (2015)—that the residual clause in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague—is procedural because the vagueness doctrine is rooted in concepts of *procedural* due process. *Amicus* further contends (Br. 33-43) that the holding of *Johnson*

does not fall within any category of substantive rules previously recognized by this Court.

Those contentions should be rejected. The classification of a new rule as substantive or procedural for purposes of *Teague*'s retroactivity bar depends upon whether the application of the new rule has a substantive or procedural effect. Because the holding of *Johnson* alters the statutory boundaries of authorized sentences that a court may lawfully impose, it is a substantive rule that is entitled to retroactive application.

I. *JOHNSON* ANNOUNCED A NEW SUBSTANTIVE RULE

A. The Status Of A New Rule As Substantive Depends On Whether Application Of The Rule Has A Substantive Or Procedural Effect

Amicus's argument (Br. 24-33) that the classification of a new constitutional rule as substantive or procedural depends upon the "*source* of the legal right vindicated by the new rule" misunderstands this Court's test for whether new rules are substantive or procedural for purposes of *Teague*.

1. To determine whether a new rule is substantive, and therefore exempt from *Teague*'s retroactivity bar, this Court has focused on the effect of applying the new rule: "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro* v. *Summerlin*, 542 U.S. 348, 353 (2004); see *Penry* v. *Lynaugh*, 492 U.S. 302, 330 (1989) (substantive rules include "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense"), abrogated on other grounds, 536 U.S. 304 (2002). Substantive rules—rules that "narrow the

scope of a criminal statute by interpreting its terms" and "constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish"—apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Summerlin*, 542 U.S. at 351-352 (citations and internal quotation marks omitted). Procedural rules, in contrast, "do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* at 352.

That analysis focuses on the *effect* of applying the new rule, not on the source of the constitutional right. That effects-based analysis traces back to Justice Harlan's concurrence in *Mackey* v. *United States*, 401 U.S. 667 (1971), in which he explained that, in determining whether a new rule should be applied retroactively, "[t]he relevant frame of reference * * * is not the purpose of the new rule whose benefit the petitioner seeks, but instead the purposes for which the writ of habeas corpus is made available." *Id.* at 682 (Harlan, J., concurring in part and dissenting in part). Affording relief from "conviction and punishment * * * for an act that the law does not make criminal" is the central justification for collateral relief from a conviction or sentence. *Davis* v. *United States*, 417 U.S. 333, 346 (1974); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 176 (1873) (granting habeas relief from a federal sentence exceeding statutory authorization); see 28 U.S.C. 2255(a).

The Court's decision in *Bousley* v. *United States*, 523 U.S. 614 (1998), illustrates the Court's effects-based analysis. The Court explained that a holding that narrows the scope of conduct covered by a federal criminal statute is substantive because it "necessarily carr[ies] a significant risk that a defendant stands convicted of an act that the law does not make criminal." *Id.* at 620 (citations and internal quotation marks omitted). That is, the *effect* of the new narrowing rule of *Bailey* v. *United States*, 516 U.S. 137, 143 (1995) (holding that a violation of 18 U.S.C. 924(c) requires evidence of "active employment of the firearm by the defendant," rather than mere possession) (emphasis omitted)), was to establish that the prisoner had been convicted of acts that the law did not criminalize, and it would therefore "be inconsistent with the doctrinal underpinnings of habeas review" to preclude the prisoner from relying on *Bailey* in support of his claim for collateral relief. *Bousley*, 523 U.S. at 621. *Bousley* did not turn to the legal source of *Bailey*'s holding to determine that it was substantive; it relied on that decision's effect of placing conduct outside the reach of existing criminal law.

2. To support the contention that vagueness holdings are non-retroactive procedural rules, *amicus* cites (Br. 28-30) *Lambrix* v. *Singletary*, 520 U.S. 518 (1997), which concluded that the holding of *Espinosa* v. *Florida*, 505 U.S. 1079 (1992) (per curiam), was a new procedural rule. Far from supporting *amicus*'s position, *Lambrix* illustrates the distinction between a substantive rule making a defendant ineligible for a punishment and a procedural rule governing the process for imposing it.

In *Espinosa*, a capital sentencing jury recommended a sentence of death after it had been instructed on an aggravating factor (that the murder was "especially wicked, evil, atrocious, or cruel," 505 U.S. at 1080 (citing Fla. Stat. Ann. § 921.141(5)(h) (West 2015)), without the limiting construction necessary to cure its vagueness, *id.* at 1081; see *Lambrix*, 520 U.S. at 531-532 & n.4. *Espinosa* held that, even though the trial judge had also found the aggravating factor—*after* presumptively applying the curative limiting construction, *ibid.*—the judge's indirect weighing of the vague aggravating factor by giving deference to the jury's sentencing recommendation "create[d] the * * * potential for arbitrariness" and therefore violated the Eighth Amendment. 505 U.S. at 1082.

Lambrix held that the new rule announced in *Espinosa* was not retroactive because it "neither decriminalize[d] a class of conduct nor prohibit[ed] the imposition of capital punishment on a particular class of persons." 520 U.S. at 539 (citation and internal quotation marks omitted). *Lambrix*, however, did not ground its holding in a finding that the constitutional source of *Espinosa*'s rule was Eighth Amendment vagueness doctrine. Rather, the basis for *Lambrix*'s retroactivity holding lies in the procedural character of *Espinosa*'s rule: the indirect weighing of the invalid factor skewed the *process* for determining a penalty for which the defendant was made eligible by the court's aggravating-factor findings. Unlike here, the invalid factor did not form a necessary predicate for *eligibility* for an enhanced sentence.[1] Accordingly,

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[1] At the time of *Espinosa* and *Lambrix*, the sentencing jury rendered only an advisory recommendation and its findings of aggravating factors were not, under state law, sufficient to justify

the sentencing jury's consideration of one vague aggravating factor, without a proper limiting instruction under Florida law, simply resulted in that invalid factor being *indirectly* weighed in the ultimate decision by the trial judge whether to impose a capital sentence. *Espinosa*'s bar against such indirect weighing is a quintessential procedural rule. U.S. Br. 23; pp. 6-7, *infra*.

3. *Amicus* contends (Br. 31) that the substantive effect of a rule grounded in the Constitution's procedural protections cannot transform the rule into a substantive one because "virtually every [procedural] rule" "has the *potential* to be outcome-determinative in at least some, if not many, cases." That argument misconceives the basic distinction this Court has drawn between substantive and procedural rules.

Procedural rules "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Summerlin*, 542 U.S. at 352; see *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 730 (2016). The outcome of applying a new substantive rule, in contrast, is that a prisoner

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a capital sentence. See *Espinosa*, 505 U.S. at 1080; *Lambrix*, 520 U.S. at 534-535. Rather, the sentencing judge, not the jury, was to "make the critical findings necessary to impose the death penalty." *Hurst* v. *Florida*, 136 S. Ct. 616, 622 (2016). In both *Espinosa* and *Lambrix*, the trial judge unquestionably found valid aggravating factors rendering the defendants eligible for a capital sentence. See *Espinosa*, 505 U.S. at 1080 (trial court found four aggravating factors and two mitigating factors); *Lambrix*, 520 U.S. at 521 (trial court found five aggravating factors for one murder, four aggravating factors for a second murder). Today, the jury would have to find the necessary aggravating factor to make a defendant death-eligible, *Hurst*, 136 S. Ct. at 621-622, but that has no impact on the retroactivity analysis in *Lambrix*.

"stands convicted of an act that the law does not make criminal or faces a punishment the law cannot impose upon him." *Summerlin*, 542 U.S. at 352 (citations and internal quotation marks omitted). It is that latter category that implicates the core justification for habeas relief. *Davis*, 417 U.S. at 346; *Ex parte Lange*, 85 U.S. (18 Wall.) at 176.

Amicus identifies (Br. 31-32) *Beard* v. *Banks*, 542 U.S. 406 (2004), and *Sawyer* v. *Smith*, 497 U.S. 225 (1990), as cases where the Court concluded that new constitutional rules were procedural "despite their obvious effect on a defendant's ultimate sentence." But the rules in those cases—that juries may consider mitigating factors even if not found unanimously, *Banks*, 542 U.S. at 408, 420; and that a jury must not be told that the responsibility for determining the defendant's sentence rests elsewhere, *Sawyer*, 497 U.S. at 229, 232, 244-245—do not have an "obvious effect[]" (Amicus Br. 31) on the outcome of the sentencing proceeding. Those rules are concerned with the information that a capital sentencing jury may consider in deciding whether an authorized sentence of death is appropriate; they do not alter the range of punishments the jury may impose. See *Banks*, 542 U.S. at 419-420 (effect of the new rule was to "remove some remote possibility of arbitrary infliction of [a] death sentence"); *Sawyer*, 497 U.S. at 244 (new rule was designed to enhance "the accuracy of capital sentencing"). As the Court explained in *Montgomery*, "[t]hose decisions altered the processes in which States must engage before sentencing a person to death. The processes may have had some effect on the likelihood that capital punishment would be imposed, but none of those decisions rendered a certain

penalty unconstitutionally excessive for a category of offenders." 136 S. Ct. at 736.

The holding of *Johnson*, in contrast, goes beyond raising the possibility of a different outcome for a defendant whose ACCA status depends on the residual clause. In *Johnson*, the Court *invalidated* the residual clause as "void for vagueness." 135 S. Ct. at 2562. *Johnson* therefore *eliminates* any possibility of imposing a sentence greater than ten years of imprisonment on a prisoner whose ACCA status depends on that clause. 18 U.S.C. 924(a)(2). Thus, for the class of prisoners who received a sentence of at least 15 years of imprisonment (the ACCA's mandatory minimum) based on the now-invalid residual clause, *Johnson* establishes that their sentences are illegal because the sentencing court had no authority to impose that enhanced term. See *Montgomery*, 136 S. Ct. at 730-731 (relying on *Ex parte Siebold*, 100 U.S. 371, 376-377 (1879), to conclude that "[a] penalty imposed pursuant to an unconstitutional law is * * * void").[2]

4. The effects-based rationale for categorizing new rules as substantive or procedural demonstrates why the United States takes the position that *Johnson* applies retroactively in ACCA cases, but not in cases where application of the similarly worded residual clause in Sentencing Guidelines § 4B1.2(a), led to a

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[2] *Amicus* suggests (Br. 38-39) that this definition of a class of defendants for whom a punishment is prohibited is "circular" and would necessarily encompass all defendants whose rights would be violated under *any* new rule. That is incorrect. The definition encompasses a class consisting of those no longer *eligible* for the sentence in question; it would not apply to rules that create a class of persons facing the same ranges of sentences under new and different procedures.

career-offender sentence. Compare Amicus Br. 32-33 (suggesting that the rule is procedural in all contexts), with Federal Public and Community Defenders Amicus Br. 14-15 (suggesting that it is substantive in all contexts).

The rule adopted in *Johnson* has substantive effect in ACCA cases because it increases a sentence to 15 years to life imprisonment, which is "a punishment that the law cannot impose." *Summerlin*, 542 U.S. at 352. Compare 18 U.S.C. 924(e), with 18 U.S.C. 924(a)(2); U.S. Br. 26-27. The same principles dictate that *Johnson* is not retroactive in guidelines cases. The invalidation of the residual clause in Guidelines § 4B1.2(a) could establish an incorrect guidelines range for a defendant who was sentenced as a career offender because a prior conviction was counted under the residual clause. See Sentencing Guidelines § 4B1.1. But it would not (and could not) alter the statutory boundaries for sentencing set by Congress for the defendant's crime. The Sentencing Commission has no authority to override Congress. See *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989) (Sentencing Guidelines do not usurp "the legislative responsibility for establishing minimum and maximum penalties for every crime," but instead operate "within the broad limits established by Congress"). A sentence imposed on the basis of an incorrect guidelines range will still fall within an unchanged statutory range, which is not true in a case involving prejudicial *Johnson* error under the ACCA.[3]

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[3] A holding that a *statutory* mandatory minimum sentence was imposed as a result of legal error in counting a prior conviction would be a substantive ruling, even if the sentence remained within the authorized statutory range. See U.S. Amicus Br. at 5, 15-17,

5. Justice Harlan's concurring opinion in *Mackey* and his opinion for the Court in *United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971), confirm that the substantive effect of applying a new rule, and not the constitutional source of the rule, determines whether the rule is substantive and should be applied retroactively. Justice Harlan pointed to the "divergent ways" in which the new rule announced in *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), applied in *Mackey* and *United States Coin & Currency* to demonstrate that "[s]ome rules may have both procedural and substantive ramifications." *Mackey*, 401 U.S. at 692 n.7 (opinion of Harlan, J.).

Marchetti and *Grosso* held that a defendant who asserts his Fifth Amendment privilege against self-incrimination may not be prosecuted for failing to register as a gambler and pay the related gambling excise tax. *Marchetti*, 390 U.S. at 60-61; *Grosso*, 390 U.S. at 67 ("petitioner's submission of an excise tax payment, and his replies to the questions on the attendant return, would directly and unavoidably have served to incriminate him"). In *United States Coin & Currency*, Justice Harlan's opinion for the Court ex-

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Montgomery v. *Louisiana*, No. 14-280 (filed July 29, 2015) (explaining that a ruling identifying a mandatory-minimum error is substantive because it expands the range of permissible sentencing outcomes). But an error in calculating the guidelines range does not have that effect; it simply affects the process for imposing sentence within the statutory boundaries. See U.S. Br. 38 n.9; cf. *Conrad* v. *United States*, No. 14-3216, 2016 WL 851703, at *2-*3 (7th Cir. Mar. 4, 2016) (declining to treat use of the incorrect guidelines range in violation of the *Ex Post Facto* Clause, see *Peugh* v. *United States*, 133 S. Ct. 2072 (2013), as retroactive on collateral review).

plained that the holdings of *Marchetti* and *Grosso* applied retroactively in a forfeiture proceeding based on failure to file the incriminating tax documents, because those cases established that gamblers "had the Fifth Amendment right to remain silent in the face of the statute's command that they submit reports which could incriminate them." 401 U.S. at 723. "[T]he conduct being penalized" through the forfeiture, he stated, "is constitutionally immune from punishment." *Id.* at 724.[4]

In his concurring opinion in *Mackey*, decided on the same day, Justice Harlan concluded that the rule announced in *Marchetti* and *Grosso* did not apply retroactively to warrant habeas relief for a prisoner who had been convicted for failure to pay income tax, even though the government had introduced his wagering excise tax returns at trial. 401 U.S. at 700. Justice Harlan explained that, unlike the defendant in *United States Coin & Currency*, who was penalized for failure to file the incriminating tax documents, the conduct for which Mackey was being punished—evading payment of federal income tax—was not constitutionally immune from punishment. *Ibid.* Mackey was claiming only that "the procedures utilized in procuring his conviction were vitiated by" *Marchetti* and *Grosso*. That procedural consequence did not warrant collateral relief. *Id.* at 701 (opinion of Harlan, J.). The different outcomes in *Mackey* and *United*

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[4] *United States Coin & Currency* arose on direct appeal, but it was decided before *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), held that all new rules apply to cases on direct appeal, and the United States had argued that *Marchetti* and *Grosso* should not be applied retroactively to seizures of property that occurred before the decisions were handed down. 401 U.S. at 722.

States Coin & Currency confirm Justice Harlan's understanding that the *effect* of applying a new rule in a given context, and not the constitutional source of the right vindicated by the new rule (which, after all, was precisely the same in both cases), establishes whether the rule is entitled to retroactive application.

B. The Holding of *Johnson* Is Substantive Because Defendants With ACCA Sentences That Depend Upon The Residual Clause Face An Unauthorized Punishment

Amicus contends (Br. 33-43) that *Johnson* does not fit within any recognized category of substantive rules. That argument is misconceived. Because the holding of *Johnson* alters the statutory boundaries of permissible sentences that a court may impose under the ACCA, it falls within this Court's established framework for identifying substantive rules.

1. *Amicus* contends (Br. 33-39) that the term "substantive" is a "legal term of art" that derives from Justice Harlan's concurrence in *Mackey* and covers only new rules that "set forth categorical constitutional guarantees that place certain criminal laws and punishments *altogether beyond* the State's power to impose." Br. 35 (quoting *Montgomery*, 136 S. Ct. at 729); *ibid.* (substantive decisions "announce a substantive individual *right* to engage in the conduct punishable under the residual clause"). *Amicus* concludes (Br. 35-39) that *Johnson* did not announce such a rule because Congress remains free to impose a 15-year sentence on a defendant with the same prior convictions as petitioner.

That view cannot be squared with *amicus*'s concession (Br. 44-45) that *Ex parte Siebold*, *supra*, and *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886), involved substan-

tive rules. The conduct at issue in *Ex parte Siebold*—interfering with an election, including by stuffing a ballot box, 100 U.S. at 377-379—was not protected by any constitutional guarantee or outside of Congress's power to proscribe. The issue was whether Congress could regulate the election through "partial regulations intended to be carried out in conjunction with regulations made by the States," or whether it had to "assume the entire regulation of the elections of representatives" in order to properly exercise its constitutional authority. *Id.* at 382. And although the holding of *Yick Wo* was that a laundry-licensing statute had been enforced in a discriminatory manner in violation of the Equal Protection Clause, 118 U.S. at 366-367, 373-374, the underlying conduct of operating a laundry in a wooden building without a license was not constitutionally protected, nor was it outside of the State's power to regulate. *Id.* at 366; see U.S. Br. 33-34.

Amicus's source-based analysis is not only contrary to this Court's approach, it would introduce needless and irrelevant complexities into retroactivity analysis. *Amicus* posits (Br. 13) that rules grounded in substantive due process are retroactive, but rules grounded in procedural due process are not. But the precise constitutional basis of vagueness doctrine is by no means clear. The vagueness doctrine is grounded in the "fail[ure] to give ordinary people fair notice of the conduct it punishes," but it also protects against laws that lack sufficiently clear standards and therefore "invite[] arbitrary enforcement." *Johnson*, 135 S. Ct. at 2556. Although the notice function of vagueness may have a procedural function (Amicus Br. 24-25), the arbitrary-enforcement aspect of the doctrine ad-

dresses the content of the law. The justification of "establish[ing] minimal guidelines to govern law enforcement" is "the more important aspect of the vagueness doctrine," *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983) (citation and internal quotation marks omitted), and it was the basis for the Court's holding in *Johnson*, see 135 S. Ct. at 2558 ("By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.").

In any event, the Court's holding in *Johnson* is qualitatively different from procedural due process rules providing notice and a right to be heard in a particular proceeding, like a rule addressing "notice of * * * the evidence the [government] intend[s] to use against [the defendant] at the penalty hearing of his trial." *Gray* v. *Netherland*, 518 U.S. 152, 155, 170 (1996) (holding that a new rule regarding the adequacy of such notice in a capital sentencing trial was a procedural rule). *Johnson invalidated* the residual clause, thereby eliminating a category of crimes that will trigger a 15-year mandatory minimum sentence. 135 S. Ct. at 2562. "[A] change in the permissible length of a sentence is not procedural. The change does not affect the sentencing process but only the sentencing result—the length of the sentence, which is a matter of substance no less than the verdict is." *Conrad* v. *United States*, No. 14-3216, 2016 WL 851703, at *2 (7th Cir. Mar. 4, 2016).

2. Equally important, this Court's decisions recognize that the universe of substantive rules that have retroactive effect is not strictly limited to the exam-

ples described by Justice Harlan. To the contrary, in *Bousley*, the Court explained that statutory-interpretation decisions of this Court holding that a federal criminal statute does not reach certain conduct are "*like*" decisions that "plac[e] conduct beyond the power of the criminal law-making authority to proscribe," and are therefore substantive and retroactive, because of the "significant risk that a defendant stands convicted of an act that the law does not make criminal." 523 U.S. at 620 (emphasis added; citations and internal quotation marks omitted).

The Court in *Bousley* concluded that the holding of *Bailey*, which narrowed the construction of "use" of a firearm in 18 U.S.C. 924(c) to exclude possession offenses, was substantive and retroactive, 516 U.S. at 624, even though Congress could (and did) amend Section 924(c)(1) to restore possession offenses to the statute. See U.S. Br. 36-37. In other words, the holding of *Bailey* was substantive even though prohibiting the possession of a firearm during and in relation to a crime of violence or a drug trafficking crime was not "altogether beyond [Congress's] power to impose." *Montgomery*, 136 S. Ct. at 729.

Amicus attempts to explain away *Bousley* (Br. 40-41) by arguing that, in cases where the Court "interprets the terms of [a] statute in furtherance of congressional intent," the Court is explaining what the statute has always meant since its enactment. Br. 40 (citing *Rivers* v. *Railway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994)). According to *amicus* (*ibid.*), statutory-construction decisions therefore raise separation-of-powers concerns because conduct falling outside of the narrow construction of the statute "was *never* unlawful." But that explanation cannot distin-

guish statutory-construction decisions from the constitutional vagueness holding of *Johnson*. In *Danforth* v. *Minnesota*, 552 U.S. 264 (2008), the Court explained that when a decision of this Court establishes a new constitutional rule, the source of that new rule "is the Constitution itself, not any judicial power to create new rules of law," and the underlying right therefore "necessarily pre-exists our articulation of the new rule." *Id.* at 271.

Amicus contends (Br. 40-41) that declining to apply the vagueness holding of *Johnson* retroactively would raise no separation of powers concerns because Congress *wanted* to subject at least those prisoners with previous convictions for "clearly risky crimes" to 15-year sentences—and the holding of *Johnson overrode* that congressional intent. But the Court rejected that view of the residual clause in *Johnson*, noting that many convictions that may seem to be straightforward cases for application of the residual clause may "turn out not to be so easy after all," 135 S. Ct. at 2560, and that the residual clause is so vague that it cannot even be construed or applied to any core category of crimes, *id.* at 2562 (residual clause is "a judicial morass that defies systemic solution" and "a black hole of confusion and uncertainty") (citation and internal quotation marks omitted); U.S. Br. 35. In any event, once the Court facially invalidated the residual clause as unconstitutionally vague, despite recognizing that some crimes are "obviously risky," 135 S. Ct. at 2561, the result is that the residual clause has always been invalid, see *Danforth*, 552 U.S. at 271, and covers nothing.

Separation-of-powers concerns are therefore implicated when a defendant is serving a criminal sentence

under a statute that this Court has declared void for vagueness. An Article III court has no power to lawfully impose a 15-year sentence if the statutory maximum term of imprisonment validly authorized by Congress is ten years. See *United States* v. *Evans*, 333 U.S. 483, 486 (1948) ("In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions."); U.S. Br. 30. A defendant sentenced under the ACCA's residual clause "faces a punishment that the law cannot impose upon him," *Summerlin*, 542 U.S. at 352—and the holding of *Johnson* therefore has a substantive effect—even if a future class of defendants could receive that punishment if the law were amended.

3. Given the holding of *Bousley* and the separation-of-powers theory that *amicus* sets forth to account for that decision, *amicus* is forced to acknowledge (Br. 41-42) that the Court's decisions in *Begay* v. *United States*, 553 U.S. 137 (2008), and *Chambers* v. *United States*, 555 U.S. 122 (2009), which narrowed the scope of the residual clause by interpreting its terms to exclude certain convictions from qualifying for the enhancement, announced new substantive rules that apply retroactively on collateral review. See U.S. Br. 31-33. That concession confirms that the theory *amicus* sets forth is unsound.

The "canon of strict construction of criminal statutes" is a "junior version of the vagueness doctrine" that "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States* v. *Lanier*, 520 U.S. 259, 266 (1997) (citation and internal quotation marks omitted). The vagueness doctrine is more powerful

medicine for insoluble ambiguity. It "bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Ibid.* (quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385 (1926)). It would thus be strikingly anomalous if *Begay* and *Chambers*, which only narrowed the scope of the residual clause under the "junior version of the vagueness doctrine," achieved the status of substantive rules that apply retroactively on collateral review, but the constitutional holding of *Johnson* barring the enforcement of the residual clause as entirely void for vagueness was merely a procedural rule.

4. *Amicus* contends (Br. 42-43) that if *Johnson*'s invalidation of the residual clause is a substantive rule, then the Court's decision in *Ring* v. *Arizona*, 536 U.S. 584 (2002), should also have been classified as substantive because it "invalidated state capital sentencing statutes," yet the Court held that *Ring* announced a procedural rule. See *Summerlin*, 542 U.S. at 353. That is wrong. In *Summerlin*, the Court concluded that *Ring*, which held that the Sixth Amendment requires a jury—not a judge—to "find an aggravating circumstance necessary for imposition of the death penalty," *Ring*, 536 U.S. at 609, was a "prototypical procedural rule[]" because altering the decision-maker in a capital sentencing scheme "did not alter the range of conduct Arizona law subjected to the death penalty." *Summerlin*, 542 U.S. at 352. The holding of *Johnson*, in contrast, alters the statutory boundaries of the authorized sentences that the decision-maker may impose, and it is substantive for that reason.

C. *Amicus Curiae*'s Policy Arguments Do Not Justify Refusing To Recognize *Johnson* As Substantive

1. *Amicus* contends (Br. 49-52) that the Court should not apply *Johnson* retroactively because it would produce a "windfall" for prisoners who received ACCA sentences based on residual-clause convictions that clearly fall within the parameters of that (now-invalid) clause. As explained above, p. 16, *supra*, the Court rejected that view of the residual clause in *Johnson*. 135 S. Ct. at 2560. *Amicus*'s contention (Br. 50) that some defendants who were sentenced under the residual clause "had sufficient notice" that their prior convictions would subject them to an enhanced penalty under the ACCA is irreconcilable with the Court's holding that the statute is so incurably vague that it cannot even be construed. *Johnson*, 135 S. Ct. at 2562.

2. *Amicus* notes (Br. 51-52) that the retroactive application of *Johnson* will impose considerable costs on the criminal justice system in the form of supplemental briefing to determine whether a prisoner's ACCA sentence is justified based on another portion of the definition of "violent felony" such as the elements clause, 18 U.S.C. 924(e)(2)(B)(i), and the necessity of recalculating the prisoner's guidelines range and holding a new sentencing hearing. But the retroactive application of new substantive rules to cases on collateral review always comes with some cost. Those costs are justified where, as in the case of a defendant whose ACCA sentence depends upon the residual clause, "the criminal process [has come] to rest at a point where it ought properly never to repose." *Montgomery*, 136 S. Ct. at 732 (quoting *Mackey*, 401 U.S. at 693 (opinion of Harlan, J.)).

3. *Amicus* further contends (Br. 52-53) that applying *Johnson* retroactively would undermine the decisions of prosecutors who negotiated plea deals for Section 922(g)(1) offenses with defendants who had committed more serious crimes, in light of the ACCA's severe 15-year mandatory minimum sentence. Although the United States advanced that argument in *Johnson* as a reason not to invalidate the residual clause based on the reliance interests that underlie the principle of *stare decisis*, U.S. Supp. Br. at 48-51, *Johnson*, *supra* (No. 13-7120); *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991), the argument has no bearing on whether a rule is substantive. *Amicus*'s reliance argument would have been relevant to retroactivity analysis under *Linkletter* v. *Walker*, 381 U.S. 618, 636 (1965), but *Teague* jettisoned that approach.

4. *Amicus* contends (Br. 53-55) that "[a]pplying *Johnson* retroactively" could undermine countless other convictions and sentences under other federal and state laws that contain language similar to the language Congress used in the residual clause. *Amicus* notes (Br. 53) that some courts have held that the residual clause in Sentencing Guidelines § 4B1.2(a) is unconstitutionally vague in light of *Johnson*, but as explained above, pp. 8-9, *supra*, applying the holding of *Johnson* to the residual clause in the Guidelines does not mean that *Johnson* has retroactive effect in that context.

Amicus further notes (Br. 54) that some lower courts have concluded that other federal statutes, specifically 18 U.S.C. 924(c)(3)(B) and 18 U.S.C. 16(b), are unconstitutionally vague in light of *Johnson*. The Court in *Johnson* rejected the suggestion that its decision would necessarily invalidate other statutes

with similar language, 135 S. Ct. at 2561, and whether those lower-court decisions are upheld on further review remains to be seen. But in any event, the potential effect of *Johnson* on other criminal statutes does not justify denying collateral relief to a class of prisoners serving unauthorized sentences.

II. THE COURT SHOULD NOT AFFIRM THE JUDGMENT OF THE COURT OF APPEALS ON AN ALTERNATIVE GROUND

A. *Amicus* contends (Br. 56-58) that the Court "can affirm without remanding" because petitioner's robbery conviction qualifies as a violent felony under the ACCA's elements clause. See 18 U.S.C. 924(e)(2)(B)(i) (prior conviction punishable by a term exceeding one year of imprisonment is a violent felony if it "has as an element the use, attempted use, or threatened use of physical force against the person of another"); *Curtis Johnson* v. *United States*, 559 U.S. 133, 140 (2010) (force required by the elements clause is "force capable of causing physical pain or injury to another person"). Although petitioner's conviction may well qualify on that basis, this Court should not address that issue in the first instance. "[The Court] ordinarily do[es] not decide in the first instance issues not decided below." *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 168-169 (2004) (quoting *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (per curiam)). Affirming on that basis would be particularly unwarranted because the standard for issuing a certificate of appealability requires only a reasonably debatable issue, and the Eleventh Circuit's opinion on direct appeal avoiding that issue suggests that the elements-clause issue would meet that standard. See U.S. Br. 43-46.

B. Nor should the Court, as *amicus* suggests (Br. 58-60), affirm the court of appeals' denial of a certificate of appealability based on petitioner's procedural default of his *Johnson* claim. The United States did not assert a defense of procedural default in its response to the petition for a writ of certiorari, see U.S. Mem. 1-3 (suggesting that the Court should grant the petition, vacate the judgment of the court of appeals, and remand for further proceedings in light of *Johnson*), or in its opening brief. The United States hereby expressly waives any procedural default defense against petitioner on his *Johnson* claim.

The Court should accept that waiver. *Wood* v. *Milyard*, 132 S. Ct. 1826, 1830 (2012) (court may not "bypass, override, or excuse" the government's "deliberate waiver of a * * * defense" in a habeas case; finding waiver of statute of limitations defense); *Bryant* v. *Warden*, 738 F.3d 1253, 1261 (11th Cir. 2013) (same as to procedural default). And in any event, it would make little sense to decide this case on grounds of procedural default. The conflict in the courts of appeals on the question whether *Johnson* is retroactive developed in the context of denials of authorization for leave to file second or successive Section 2255 motions, which raise the question whether this Court "made" *Johnson* retroactive, see 28 U.S.C. 2244(b)(3)(C), 2255(h)(2), and that conflict is not directly reviewable by this Court, see 28 U.S.C. 2244(b)(3)(E), 2255(h). Prisoners who need authorization to file second or successive Section 2255 motions must comply with a one-year statute of limitations, 28 U.S.C. 2255(f)(3), which runs from the date of the Court's decision in *Johnson*, see *Dodd* v. *United States*, 545 U.S. 353, 357 (2005). Those prisoners need

a definitive ruling on retroactivity from the Court this Term. See U.S. Br. 41-42. Accordingly, the Court should decide whether *Johnson* is a substantive rule that applies retroactively on collateral review.

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be vacated and the case should be remanded.

Respectfully submitted.

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No. 15-6418

IN THE
Supreme Court of the United States

GREGORY WELCH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

Pursuant to this Court's Rule 15.8, Petitioner submits this supplemental brief regarding the government's December 22, 2015 response in *Harrimon v. United States*, No. 15-7426.

In response to Petitioner's petition for a writ of certiorari, the government represented that this case would not be an appropriate vehicle to resolve the circuit split regarding whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), has been "made retroactive" to second or successive § 2255 motions "because petitioner seeks review of the denial of his first Section 2255 motion." Mem. of United States 3. In its recent response in *Harrimon*, however, the government has taken the opposite position, representing that review of a first § 2255 motion "would afford an opportunity to resolve the conflict over whether *Johnson* is a substantive rule that is retroactive to cases on collateral review," the resolution of which "would expressly 'ma[k]e' *Johnson* retroactive and permit prisoners filing timely second or successive motions to satisfy the gatekeeping requirements of 28 U.S.C. 2255(h)(2)." Br. of United States at 23, *Harrimon v. United States*, No. 15-7426 (U.S. Dec. 22, 2015). The government further suggests that the Court may wish to grant certiorari *prejudgment* in *Harrimon*. *Id.* at 31

To the extent that this Court accepts the government's newfound position that this Court should grant plenary review of *Johnson*'s applicability to an initial

§ 2255 motion, it would make little sense to do so *prejudgment*—which raises complex procedural hurdles under this Court's Rule 11, *see* Br. of United States at 23-28, *Harrimon v. United States*, No. 15-7426 (U.S. Dec. 22, 2015)—when Petitioner's case presents an opportunity to review the retroactivity of *Johnson* to initial § 2255 motions without such procedural hurdles. Here, the Eleventh Circuit has issued a judgment on Petitioner's request for a certificate of applicability, and there is no dispute that Petitioner was sentenced pursuant to the now-void residual clause of ACCA. Pet. Reply 3-4; Mem. of United States 1-2. Moreover, Petitioner raised the retroactivity of *Johnson* at every opportunity, including requesting a stay pending *Johnson* and requesting leave to seek reconsideration in light of *Johnson*. Pet. Reply 3-4. Petitioner is now entitled to the benefit of *Johnson* pursuant to the simple fact that *Johnson* was decided after the court of appeal's decision and before resolution of his initial § 2255 has become final.

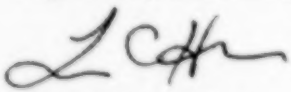
The government's recognition that this Court could use its discretionary certiorari power to GVR this case is itself an acknowledgment that the Court could—if it chooses to review the applicability of *Johnson* to an initial § 2255 motion—use its discretionary certiorari power to grant plenary review in this case. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (explaining that GVR is simply a means of "conserv[ing] the scarce resources of this Court that might otherwise be expended on plenary consideration"). Granting plenary review of *Harrimon* would

lead to the bizarre circumstance in which Petitioner's case—which presents an unobstructed opportunity to review the applicability of *Johnson* to an initial § 2255 motion—is held (by this Court or, upon GVR, by the Eleventh Circuit) pending a prejudgment case that presents needless procedural complexities.

CONCLUSION

As Petitioner stated in his Reply Brief, the Court should resolve the conflict over whether *Johnson* has been "made retroactive" to successive petitions using one of the successive petitions pending before this Court and immediately GVR this case for further consideration in light of *Johnson*. In the alternative, should the Court wish to resolve the conflict over *Johnson* by granting a petition for certiorari in a case involving an initial petition, the Court should grant plenary review of this case.

Respectfully submitted,



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BRIEF OF THE COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

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QUESTIONS PRESENTED

1. Whether the district court erred when it denied petitioner's Section 2255 motion to vacate, which alleged that his prior conviction for robbery under Fla. Stat. § 812.13(1) did not qualify as a violent felony under the Armed Career Criminal Act of 1984 ("ACCA").

2. Whether *Johnson* v. *United States*, 135 S. Ct. 2551 (2015)—which held that the residual clause of ACCA, 18 U.S.C. § 924(e)(2)(B)(ii), is void for vagueness based on principles of procedural due process—nonetheless announced a new "substantive" rule of constitutional law that is retroactively applicable on collateral review under *Teague* v. *Lane*, 489 U.S. 288 (1989).

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BRIEF OF THE COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

INTEREST OF *AMICUS CURIAE*

Amicus curiae Helgi C. Walker was appointed by the Court to brief and argue this case in support of the judgment below.

INTRODUCTION

This Court's landmark decision in *Teague* v. *Lane* established that new constitutional rules "generally ... should not be applied retroactively to criminal cases on collateral review." 489 U.S. 288, 303 (1989) (plurality opinion). That is so because the "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Id.* at 309. For the past quarter century, the Court has recognized only two narrow exceptions to this prohibition against retroactivity: substantive rules that "plac[e] 'certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe,'" and procedural rules that "requir[e] the observance of 'those procedures that ... are implicit in the concept of ordered liberty.'" *Id.* at 307, 310-11 (ellipsis in original) (quoting

Mackey v. *United States*, 401 U.S. 667, 692-93 (1971)).[1]

Johnson v. *United States*, 135 S. Ct. 2551 (2015), fits into neither of these exceptions. It held that the residual clause of the Armed Career Criminal Act ("ACCA") is void for vagueness. As this Court's precedents and hornbook law show, that holding is firmly rooted in the *procedural* guarantees of the Due Process Clause. It is thus impossible to say, with any fair use of language or logic, that the new rule announced in *Johnson* falls within the unique category of "'*substantive* due process' rules," *Mackey*, 401 U.S. at 692 (emphasis added), that Justice Harlan explained and the Court in *Teague* agreed could suffice to upset otherwise final criminal judgments.

Petitioner's argument to the contrary rests on a superficial analysis of *Johnson* that focuses on the *effects* of its holding and loosely describes them as "substantive." But this Court's retroactivity cases look to the nature of the constitutional right underlying the new rule—in particular, whether the rule is based on a procedural or substantive guarantee—not its consequences. And the term "substantive" must be understood in light of Justice Harlan's exception for "substantive due process" rules. Remarkably, petitioner never cites—much less grapples with—the examples of such conduct-protecting rules that Justice Harlan specifically identified. Presumably, that is because *Johnson*, unlike those cases, plainly does

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[1] Citations of *Mackey* refer to Justice Harlan's opinion concurring in part and dissenting in part. Citations of *Teague* refer to the plurality opinion.

not immunize any conduct from punishment. Instead, petitioner points to various snippets from this Court's habeas cases, but no feat of legal alchemy can transform *Johnson* from a decision based on procedural rights into a substantive one. He simply cannot squeeze *Johnson* into the category of substantive rules.

Petitioner thus resorts to the extreme claim that, because *Johnson* declared the residual clause unconstitutional, this Court must pretend that it never existed at all. This argument ignores *Teague*'s seismic shift in retroactivity jurisprudence. In *Teague*, the Court wisely abandoned a regime under which all new constitutional rules applied retroactively, irrespective of the fundamental difference between direct appeal and collateral review, in order to ensure a basic degree of finality in criminal law. It should resist petitioner's invitation to return to that failed jurisprudence.

Under this Court's modern retroactivity precedents, *Johnson* automatically applies to all cases pending on direct review. Those sentenced under ACCA's residual clause will reap its benefits on appeal. But applying *Johnson*'s new rule retroactively in post-conviction proceedings as well would impose undue societal costs: It would result in the release of hundreds or thousands of dangerous criminals, including many who were without doubt properly sentenced under the residual clause given this Court's repeated recognition that Congress intended to require enhanced sentences for violent recidivists and possessed the constitutional authority to do so. That this Court later decided that Congress had exercised that undisputed authority in insufficiently clear

terms does not make these final residual clause sentences "somehow forever erroneous." *Mackey*, 401 U.S. at 667-68.

In all events, petitioner is not entitled to relief under 28 U.S.C. § 2255, because his sentence was plainly valid under the elements clause of ACCA, and he triply defaulted any claim under *Johnson*.

STATEMENT

In 2010, Petitioner Gregory Welch pleaded guilty to being a felon in possession of a firearm. *See* 18 U.S.C. § 922(g)(1). Based on his three prior convictions for violent felonies, the district court sentenced him to imprisonment for 180 months, the statutory minimum under ACCA, 18 U.S.C. § 924(e). On appeal, he argued that his conviction for Florida strong-arm robbery did not qualify as a violent felony. The Eleventh Circuit affirmed, and this Court denied review. *See United States* v. *Welch*, 683 F.3d 1304 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 913 (2013).

Roughly one year later, petitioner filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. He reasserted that his robbery conviction did not constitute a violent felony. The district court denied his motion, and the Eleventh Circuit denied his request for a certificate of appealability ("COA"). Several weeks later, this Court held in *Johnson* that ACCA's residual clause is void for vagueness. Petitioner sought a writ of certiorari, arguing that his sentence was unlawful because the residual clause is unduly vague.

A. STATUTORY BACKGROUND

Finding that many violent crimes "are committed by a very small percentage of repeat offenders," Congress enacted ACCA to "increase the participation of the federal law enforcement system in efforts to curb armed, habitual (career) criminals." H.R. Rep. No. 98-1073, at 1 (1984). Based on its determination that robberies and burglaries were among "the most damaging crimes to society," *id.* at 3, Congress imposed an enhanced 15-year mandatory minimum sentence on those felons convicted of possessing a firearm "who ha[d] three previous convictions ... for robbery or burglary, or both," Pub. L. No. 98-473, § 1802, 98 Stat. 1837, 2185 (1984).

Two years later, Congress determined that "the time ha[d] come to broaden [the definition of career criminal] so that we may have a greater sweep and more effective use of this important statute." *Taylor* v. *United States*, 495 U.S. 575, 583 (1990) (quotation marks omitted). Congress thus expanded "the range of predicate offenses" under ACCA, *id.* at 584, to cover any "violent felony" or "serious drug offense," Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402, 100 Stat. 3207, 3207-39.

The amended ACCA defined "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year" that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the elements clause); (2) "is burglary, arson, or extortion, [or] involves use of explosives" (the enumerated-crimes clause); or (3) "otherwise involves conduct that presents a serious potential risk of physical in-

jury to another" (the residual clause). 18 U.S.C. § 924(e)(2)(B)(i)-(ii).

"In *Taylor* ... , this Court held that [ACCA] requires courts to use a framework known as the categorical approach ... [to] asses[s] whether a crime qualifies as a violent felony." *Johnson* v. *United States*, 135 S. Ct. 2551, 2557 (2015). Under this approach, a court examines "how the law defines the offense and not ... how an individual offender might have committed it on a particular occasion." *Ibid.* (quotation marks omitted).

Applying this framework in *James* v. *United States*, 550 U.S. 192 (2007), this Court held that attempted burglary under Florida law qualified as a violent felony because it "poses a risk of violence similar to that presented by the completed offense." *Id.* at 203-07 The Court rejected Justice Scalia's suggestion in dissent that the "residual provision is unconstitutionally vague." *Id.* at 210 n.6.

The Court subsequently decided that driving under the influence and the Illinois offense of failure to report to prison did not qualify as violent felonies, whereas the Indiana offense of vehicular flight from a law enforcement officer did. *Begay* v. *United States*, 553 U.S. 137 (2008); *Chambers* v. *United States*, 555 U.S. 122 (2009); *Sykes* v. *United States*, 131 S. Ct. 2267 (2011). In *Sykes*, the Court again rejected the notion that the residual clause was void for vagueness, holding that the provision "provides guidance that allows a person to conform his or her conduct to the law." 131 S. Ct. at 2277 (quotation marks omitted).

Nearly 30 years after enactment of the residual clause, this Court reversed course and declared it impermissibly vague, expressly "overrul[ing]" the "contrary holdings in *James* and *Sykes*." *Johnson*, 135 S. Ct. at 2563. Because *Johnson* arose on direct appeal, the Court did not confront the question whether its holding applies retroactively on collateral review.

B. Post-Conviction Relief

"The principle that collateral review is different from direct review resounds throughout [this Court's] habeas jurisprudence." *Brecht* v. *Abrahamson*, 507 U.S. 619, 633 (1993). Once direct review—"the principal avenue for challenging a conviction"—is complete, "'a presumption of finality and legality attaches to the conviction and sentence.'" *Ibid.* (citation omitted). "In keeping with this distinction," "the writ of habeas corpus has historically been regarded as an extraordinary remedy" available only to those few "'persons whom society has grievously wronged.'" *Id.* at 633-34 (citation omitted).

Issuance of the writ involves "profound societal costs." *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998) (quotation marks omitted). Most significantly, "the writ strikes at finality," *McCleskey* v. *Zant*, 499 U.S. 467, 491 (1991), which is "a crucial element" of "the effectiveness of the substantive commands of the criminal law," Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452 (1963).

Accordingly, both this Court and Congress "have found it necessary to impose significant limits" on its use. *Calderon*, 523 U.S. at 554-55 (collecting cases).

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 "to advance the finality of criminal convictions." *Mayle* v. *Felix*, 545 U.S. 644, 662 (2005). And this Court has "taken care in [its] habeas corpus decisions to reconfirm the importance of finality." *McCleskey*, 499 U.S. at 491.

C. FACTUAL BACKGROUND

1. At the time of petitioner's arrest in 2009 for unlawful possession of a firearm by a convicted felon, he had already amassed an extensive criminal record, including convictions for three violent felonies and numerous drug offenses. U.S. C.A. Br. 18, 21.

In 1996, petitioner was arrested and charged with robbery, carrying a concealed firearm, and resisting arrest. Presentence Report (PSR) ¶ 26. Approximately two weeks later, he was arrested again, *id.* ¶ 27, and charged with one count of "strong-arm robbery" under Fla. Stat. § 812.13(1) for unlawfully taking "jewelry" from his victim "by the use of force, violence, assault, or putting the said [victim] in fear," JA.187a. "[A]ccording to the victim, [petitioner] punched him in the mouth, fought with him, and grabbed his gold bracelet from his wrist, while another robber took the gold chain from the victim's neck." JA.111a. Petitioner pleaded guilty to these charges and was sentenced to 19 months in prison. PSR ¶¶ 26-27.

In the six years following his release from custody, petitioner was convicted of five other criminal offenses—ranging from driving without a license, to trespass, to drug possession. PSR ¶¶ 28-32.

Then, in 2003, petitioner was charged with one count of felony battery under Fla. Stat. § 784.041 for

"unlawfully actually and intentionally touch[ing] or strik[ing] [a victim] against his will and caus[ing] great bodily harm, permanent disability or permanent disfigurement, to-wit: by striking [the victim] on the head with a hammer or other blunt object." JA.166a. The State withdrew an initial plea deal after petitioner verbally threatened the victim in court. JA.173a ("The victim just represented to me that the defendant looked at him and told him, 'It's not over.' Based on that, there is no deal on the table. The victim just expressed to me that he is afraid for his life."). Ultimately, petitioner entered a plea of nolo contendere and was sentenced to 364 days of imprisonment. JA.167a-169a.

Between 2004 and 2007, petitioner was convicted of three additional drug possession charges. PSR ¶¶ 34, 36, 38.

2. In 2009, as part of an investigation into the shooting of two robbery victims at a nearby convenience store, police searched petitioner's apartment and found an automatic pistol and ammunition hidden in the attic. JA.103a. Petitioner, by then a convicted felon several times over, admitted that the weapon and bullets belonged to him. A federal grand jury indicted him on one felon-in-possession count under 18 U.S.C. § 922(g)(1). *See* JA.194a.

Petitioner pleaded guilty, reserving his right to appeal the denial of his motion to suppress the physical evidence. JA.104a, 141a-142a. The PSR "categorized [him] as an armed career criminal because of three prior violent felony convictions, and concluded that [ACCA] required that he be sentenced to a minimum of fifteen years in prison." JA.104a. Because

neither party (for reasons the record does not reveal) had contemplated that he would be subject to ACCA, the parties agreed to vacate his initial plea and enter into an amended plea agreement that preserved his right to challenge his classification under ACCA. JA.141a-142a.

Petitioner filed several objections to the PSR, arguing that his felony battery and strong-arm robbery convictions "should not be considered crimes of violence." JA.191a. He also sought to preserve the argument that it was a "violation of the Fifth and Sixth amendments for this enhancement to apply without being charged in the indictment, and determined by a jury." JA.162a-163a. He did not assert that the residual clause was unconstitutionally vague.

The district court ruled that "both of the challenged convictions do qualify" as violent felonies under ACCA. JA.157a. The court held that the felony battery conviction "certainly ... meets the standards for a violent felony," JA.154a, 158a, and further ruled that strong-arm robbery "meets *both* tests" for a crime of violence under ACCA: "the elements test" *and* "the residual test," JA.158a (emphasis added).

On appeal, petitioner maintained that strong-arm robbery did not count as a crime of violence "under either [test]" because the Florida statute encompassed "mere snatching." JA.104a, 113a. He argued that "the degree of 'force' required to violate the state statute at the time of his conviction was too slight to satisfy [ACCA]." JA.113a. He again failed to raise a void-for-vagueness challenge. The Eleventh Circuit concluded that it "need not decide whether snatching is sufficiently violent under the elements clause"

because strong-arm robbery "ordinarily involves a substantial risk of physical injury to the victim" and thus satisfied the residual clause. JA.117a, 119a. This Court denied review.

3. Petitioner filed a motion seeking to vacate his sentence under Section 2255. He again argued that he "was not charged as [an armed career offender] in his indictment" in purported violation of the Fifth and Sixth Amendments. JA.94a. He also claimed that he "was not an armed career offender" because his strong-arm robbery conviction was "ambiguous, vague, and was without any violence and or physical force." JA.94a, 96a. This argument was not premised on any void-for-vagueness challenge to the residual clause, but on petitioner's belief that the Florida robbery statute was "ambiguous." JA.96a-97a. He maintained that the district court lacked "proper state documentation" to make an ACCA determination. JA.97a.

He also raised ineffective-assistance claims based on his counsel's failure to "objec[t] to the second plea agreement." JA.94a-96a. He argued that the government violated his "due process" rights because it "renege[d]" on his first plea agreement by asserting that he was subject to ACCA. JA.94a.

The government opposed the motion, and the district court denied it and declined to issue a COA. JA.25a-27a. Petitioner then requested a COA from the Eleventh Circuit. JA.17a-22a. He subsequently asked the court of appeals to hold his request in abeyance pending a decision from this Court in *Johnson* "based on the fact [that] he was sentenced under the 'Residual Clause' of the ACCA." JA.15a-

16a. The Eleventh Circuit denied his requests because he "failed to make a substantial showing of the denial of a constitutional right." JA.14a.

After this Court decided *Johnson*, petitioner asked for "more time to prepare a motion to reconsider." JA.12a. The Eleventh Circuit returned the request unfiled because it was "untimely." JA.13a. Petitioner then filed a petition for a writ of certiorari, which this Court granted.

SUMMARY OF ARGUMENT

I. *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), announced a procedural rule that does not apply retroactively on collateral review.

A. Justice Harlan believed that habeas courts need not and should not "apply current constitutional law to habeas petitioners before them" outside of limited circumstances. *Mackey* v. *United States*, 401 U.S. 667, 686 (1971). This Court's groundbreaking decision in *Teague* v. *Lane* adopted this view, establishing that new constitutional rules "generally ... should not be applied retroactively to criminal cases on collateral review." 489 U.S. 288, 303 (1989).

Following Justice Harlan's lead, the Court crafted two narrow exceptions to this general principle of nonretroactivity. *First*, "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Teague*, 489 U.S. at 307 (quoting *Mackey*, 401 U.S. at 692). In applying this exception, the Court has given retroactive effect to only three particular types of new "substantive" constitutional rules: (1) rules that "place particular conduct or persons covered by [a

criminal] statute beyond the State's power to punish," *Schriro* v. *Summerlin*, 542 U.S. 348, 352 (2004); (2) rules that "prohibi[t] a certain category of punishment for a class of defendants because of their status or offense," *Saffle* v. *Parks*, 494 U.S. 484, 494 (1990) (quotation marks omitted); and (3) "decisions that narrow the scope of a criminal statute" or "modif[y] the elements of an offense" "by interpreting [the statute's] terms," *Summerlin*, 542 U.S. at 351, 354 (citing *Bousley* v. *United States*, 523 U.S. 614, 620-21 (1998)). Taken together, these precedents assess whether Congress had the constitutional *power* to proscribe and punish particular conduct, and whether it *intended* to do so.

Second, "a new rule should be applied retroactively if it requires the observance of 'those procedures that ... are implicit in the concept of ordered liberty.'" *Teague*, 489 U.S. at 311 (ellipsis in original) (quoting *Mackey*, 401 U.S. at 693). Since *Teague*, this Court has identified the right to counsel as the only rule that "qualifl[ies] under this exception." *Whorton* v. *Bockting*, 549 U.S. 406, 419 (2007).

B. The new rule announced in *Johnson* is grounded in principles of procedural—not substantive—due process. *Johnson* held that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges" in violation of "due process of law." 135 S. Ct. at 2557. The "'foundation stone' for [*Johnson*'s] analysis," *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 732 (2016), thus was the void-for-vagueness doctrine.

That doctrine vindicates the procedural guarantees of the Due Process Clause. As this Court has long held, the Constitution "erect[s] procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished." *United States* v. *Petrillo*, 332 U.S. 1, 7 (1947). As numerous decisions of this Court and hornbook law explain, fair notice and consistency of enforcement are process-based values that fall under the rubric of procedural due process, not any substantive component of due process. Indeed, the "right to notice" has been part of "the central meaning of procedural due process" for "more than a century." *Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972).

It matters not that the application of *Johnson*'s holding "affect[s] substantive criminal law." Pet. Br. 17; *see also* U.S. Br. 13-14. This Court has consistently focused on the constitutional source of a new rule, not its effects, in determining whether it is substantive or procedural. Because *Johnson* is founded on principles of procedural due process, the rule it announced cannot be anything but procedural.

Johnson's procedural rule is also not a "'watershed rul[e] of criminal procedure,'" *Summerlin*, 542 U.S. at 352 (citation omitted), and no party or *amicus* claims otherwise.

C. Petitioner cannot squeeze *Johnson* into *Teague*'s narrow exception for substantive rules.

Justice Harlan's first exception covers "'substantive due process' rules" that cabin Congress's "lawmaking authority," *Mackey*, 401 U.S. at 692, which he illustrated with specific cases that petitioner

never mentions, *see id.* at 692 n.7 *Johnson* has nothing to do with the Constitution's substantive guarantees. It did not announce a substantive right to engage in conduct that "presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). Nor did it hold that the Constitution "prohibit[s] a certain category of punishment for a *class* of defendants *because of* their status or offense." *Penry* v. *Lynaugh*, 492 U.S. 302, 330 (1989) (emphasis added), *abrogated on other grounds by Atkins* v. *Virginia*, 536 U.S. 304, 312-13 (2002). Rather, *Johnson* faulted Congress for using insufficiently clear terms in the *execution* of its undisputed power to provide enhanced sentences for certain federal crimes. Thus, "[i]f Congress wanted" to "subjec[t] *all* repeat offenders to a 15-year mandatory minimum prison term," it could constitutionally—and "very easily"—do so. *James* v. *United States*, 550 U.S. 192, 230 (2007) (Scalia, J., dissenting).

Petitioner and the government contend that *Johnson* prohibited an enhanced sentence for those defendants "whose ACCA sentence depended on the residual clause," U.S. Br. 26; *see also* Pet. Br. 19, but that artificial construction of a protected "class" has no basis in this Court's precedents. *Johnson* differs fundamentally from cases holding that the Constitution "plac[es] a substantive restriction on the State's power" to impose particular punishments on a class of offenders as defined by their shared personal identity or common conduct, all of which are rooted in the substantive guarantees of the Eighth Amendment. *See, e.g.*, *Atkins*, 536 U.S. at 321 (quotation marks omitted); *see also, e.g*, *Kennedy* v. *Louisiana*, 554 U.S. 407 (2008).

Johnson also did not "narrow the scope of [ACCA's residual clause] by interpreting its terms." *Summerlin*, 542 U.S. at 353 (citing *Bousley*, 523 U.S. at 620-21). Instead, the Court held that the residual clause "defies" construction and is "hopeless[ly] indetermina[te]." *Johnson*, 135 S. Ct. at 2558, 2562. Thus, unlike *Chambers* and *Begay*, *Johnson* did not find that Congress intended that any particular conduct should fall "outside the scope of ACCA's definition of 'violent felony.'" *Chambers* v. *United States*, 555 U.S. 122, 130 (2009). As a result, it did not implicate the separation-of-powers concerns underlying this Court's decision in *Bousley*.

Unable to fit *Johnson* into the category of "substantive" rules, petitioner contends that this Court necessarily declares a retroactively applicable rule *whenever* it deems a law "unconstitutional." Pet. Br. 1, 2, 26 n.11. But a statute can be unconstitutional for both substantive and procedural reasons, and this Court has distinguished between the two types of flaws. Moreover, the pre-*Teague* cases upon which petitioner so heavily relies—such as *Ex parte Siebold*, 100 U.S. 371 (1880)—each addressed the scope of the legislature's power to proscribe and arose during a time when all new rules applied retroactively on habeas review. Indeed, for most of the 19th century, the Supreme Court lacked any authority to review federal criminal convictions except by means of an original writ of habeas corpus. When the Court exercised its habeas authority, it thus was reviewing the judgment of conviction *itself*. This Court's habeas cases from that era consequently have little relevance to the question presented here.

D. Applying *Johnson* retroactively to otherwise-final judgments would have significant disruptive consequences. Foremost, such a holding would lead to the early release of hundreds and possibly thousands of violent felons, including those with "straightforward cases under the residual clause," *Johnson*, 135 S. Ct. at 2560, who unquestionably had sufficient notice that their predicate offenses subjected them to enhanced sentences. That would provide a dangerous windfall that the Constitution does not require and Congress plainly did not intend.

Moreover, lower courts have *already* begun to invalidate other federal laws, ranging from Sentencing Guidelines provisions to immigration statutes, under *Johnson*. Applying *Johnson* retroactively would thus invite an avalanche of collateral attacks on otherwise final convictions in a wide variety of contexts.

II. Regardless of whether *Johnson* should be applied retroactively on collateral review, the Eleventh Circuit's denial of a COA should be affirmed.

A. Petitioner's conviction for Florida strong-arm robbery qualifies as a violent felony under the elements clause because it required "the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1). Although the Eleventh Circuit assumed, without deciding, that petitioner "pleaded guilty to robbery at a time when mere snatching sufficed," JA.115a, the Florida Supreme Court explained nearly a century ago that "[t]here can be no robbery without violence." *Montsdoca* v. *State*, 93 So. 157, 159 (Fla. 1922).

B. Petitioner also triply defaulted his void-for-vagueness claim by failing to raise it at sentencing,

on direct review, or even in his Section 2255 motion. Because petitioner has made no attempt to establish "cause" for this procedural default, *see Reed* v. *Farley*, 512 U.S. 339, 354 (1994), and indeed cannot do so, the district court did not err in denying his motion.

ARGUMENT

I. *JOHNSON* DOES NOT APPLY RETROACTIVELY ON COLLATERAL REVIEW.

Under this Court's modern retroactivity jurisprudence, the new constitutional rule announced in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), applies to all cases pending on direct appeal when *Johnson* was announced. That same precedent precludes its retroactive application on collateral review to topple otherwise final criminal judgments.

A. *TEAGUE* AND ITS PROGENY LIMIT THE APPLICABILITY OF NEW RULES ON COLLATERAL REVIEW.

Petitioner treats *Teague* v. *Lane*, 489 U.S. 288 (1989), as a mere continuation of this Court's past retroactivity doctrine. Pet. Br. 1, 15. But *Teague* announced a sharp break from historical practice, establishing that new constitutional rules generally should not apply retroactively on collateral review, subject to two narrow exceptions for certain "substantive" rules of constitutional law and watershed rules of criminal procedure.

1. Before 1965, new constitutional rules "were, without discussion or analysis, routinely applied to cases on habeas review." *Danforth* v. *Minnesota*, 552 U.S. 264, 272 (2008). With new constitutional rules

being announced at "an accelerating pace in the 1950's and 1960's," *id.* at 270, the Court in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), first recognized that all new rules need not, and indeed should not, apply retroactively on collateral review. *Linkletter* held that retroactivity should instead be determined through a case-by-case evaluation of "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Id.* at 629.

Linkletter's policy-based balancing approach soon proved unworkable, "produc[ing] strikingly divergent results" for similarly situated defendants. *Danforth*, 552 U.S. at 273. Justice Harlan, in a series of opinions, sought to find a better way. *See Desist* v. *United States*, 394 U.S. 244 (1969); *Mackey* v. *United States*, 401 U.S. 667 (1971); *United States* v. *U.S. Coin & Currency*, 401 U.S. 715 (1971).[2]

2. Justice Harlan believed that "[f]inality in the criminal law is an end which must always be kept in plain view," *Mackey*, 401 U.S. at 690, and he identified the "conflict between retroactivity and finality" as "a matter of the greatest importance if the integrity of the federal judicial process [was] to be maintained in [an] era of increasingly rapid constitutional change," *Desist*, 394 U.S. at 261, 262. He also explained that the role of federal courts on collateral review "is, and always has been, significantly different from [their] role in reviewing on direct appeal the

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[2] Citations of *Desist* and *U.S. Coin & Currency* refer to Justice Harlan's opinions.

validity of nonfinal criminal convictions." *Mackey*, 401 U.S. at 682.

After considering the "competing policies" of finality, fundamental fairness, and deterrence, Justice Harlan concluded that "new constitutional rules" should apply to "all cases arising on direct review" "as a correlative" of the Court's duty to apply the Constitution to pending cases. *Mackey*, 401 U.S. at 678-80, 690. But it is "sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of all these cases on the basis of intervening changes in constitutional interpretation." *Id.* at 688-89.

Having established a "general principle" against retroactivity on collateral review, Justice Harlan acknowledged that the writ's central purpose as a guard against the incarceration of the innocent, *Desist*, 394 U.S. at 262, warranted a "few exceptions," *Mackey*, 401 U.S. at 688, 692.

First, "[n]ew 'substantive due process' rules, that is, those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe," "represent[ed] the clearest instance where finality interests should yield." *Mackey*, 401 U.S. at 692-93; *see id.* at 692 n.7 (providing specific examples). "[T]he obvious interest in freeing individuals from punishment for conduct that is constitutionally protected" is "sufficiently substantial to justify applying current notions of substantive due process to petitions for habeas corpus." *Id.* at 693.

Second, Justice Harlan suggested that "the writ ought always to lie for claims of nonobservance of those procedures that ... are implicit in the concept of ordered liberty." *Mackey*, 401 U.S. at 693 (quotation marks omitted). He therefore advocated the retroactive application of rules changing the "bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." *Ibid.*

3. In *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), the Court took the first step toward implementing Justice Harlan's vision, holding that new rules should apply to all cases pending on direct review. In 1989, the *Teague* plurality fully "adopt[ed] Justice Harlan's view of retroactivity," concluding "that new rules should always be applied retroactively to cases on direct review, but that generally they should not be applied retroactively to criminal cases on collateral review." 489 U.S. at 303, 310.

Teague also followed Justice Harlan in recognizing "only two exceptions" to the "general rule of nonretroactivity for cases on collateral review"—rules that place certain conduct "'beyond the power of the criminal law-making authority to proscribe,'" and "watershed rules of criminal procedure." 489 U.S. at 307, 311 (quoting *Mackey*, 401 U.S. at 692).

4. In applying *Teague*, this Court has faithfully adhered to Justice Harlan's approach by holding that substantive constitutional rules are, by definition, those rooted in the Constitution's "substantive guarantees." *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 731 (2016); *see also, e.g.*, *Lambrix* v. *Singletary*, 520 U.S. 518, 539 (1997) (a substantive rule "addresses a 'substantive categorical guarantee accorded by the

Constitution'" (alteration omitted) (quoting *Saffle* v. *Parks*, 494 U.S. 484, 494 (1990))). Thus, retroactivity on collateral review follows "where 'the conduct being penalized is *constitutionally immune* from punishment.'" *Montgomery*, 136 S. Ct. at 730 (emphasis added) (quoting *U.S. Coin & Currency*, 401 U.S. at 724).

This focus on substantive guarantees led the Court to retroactively apply rules "prohibiting a certain category of punishment for a class of defendants *because of their status or offense*." *Saffle*, 494 U.S. at 494 (emphasis added) (quotation marks omitted). Although *Teague* "focus[ed] solely on new rules according constitutional protection to an actor's primary conduct," the Court reasoned that Justice Harlan had spoken "in terms of *substantive categorical guarantees* accorded by the Constitution." *Penry* v. *Lynaugh*, 492 U.S. 302, 329 (1989) (emphasis added) (involving proposed rule under Eighth Amendment "prohibit[ing] the execution of mentally retarded persons"). A "new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all" because, "[i]n both cases, *the Constitution itself deprives the State of the power to impose a certain penalty*." *Id.* at 330 (emphasis added).

Applying the same logic, this Court has also given retroactive effect to "decisions that narrow the scope of a criminal statute" or "modif[y] the elements of an offense" "by *interpreting* [the statute's] terms." *Schriro* v. *Summerlin*, 542 U.S. 348, 351, 354 (2004) (emphasis added). The Court has reasoned that "[d]ecisions of this Court holding that a substantive

federal criminal statute does not reach certain conduct" are "like decisions placing conduct 'beyond the power of the criminal law-making authority to proscribe'"—they both involve "act[s] that the law does not make criminal." *Bousley* v. *United States*, 523 U.S. 614, 620 (1998) (citation omitted).

5. The nonretroactivity exception for certain rules of criminal procedure is yet more stringent. Only an "extremely narrow" set of "'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding'" may be given retroactive effect on collateral review. *Summerlin*, 542 U.S. at 352 (quoting *Saffle*, 494 U.S. at 495). "[I]n order to meet this requirement, a new rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding." *Whorton* v. *Bockting*, 549 U.S. 406, 421 (2007).

Given this demanding standard, the Court has cautioned that "it is unlikely that any" new watershed rule of criminal procedure "'ha[s] yet to emerge.'" *Tyler* v. *Cain*, 533 U.S. 656, 666 n.7 (2001) (alteration in original) (quoting *Sawyer* v. *Smith*, 497 U.S. 227, 243 (1990)). Since *Teague*, this Court has identified the right to counsel under *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), as the "only case" that "qualif[ies] under this exception." *Whorton*, 549 U.S. at 419.

B. *JOHNSON* IS GROUNDED IN PRINCIPLES OF PROCEDURAL—NOT SUBSTANTIVE—DUE PROCESS AND THUS ANNOUNCED A NEW "PROCEDURAL" RULE.

Johnson held that the residual clause is void for vagueness under the Due Process Clause of the Fifth Amendment. That holding is grounded in principles of procedural—not substantive—due process. *Johnson* thus announced a new "procedural" rule within the meaning of *Teague* and its progeny. No party or *amicus* argues that it is a "watershed" rule subject to retroactive application, and indeed it is not.[3]

1. This Court recently applied Justice Harlan's framework to decide whether the new rule announced in *Miller* v. *Alabama*, 132 S. Ct. 2455 (2012), applied retroactively on collateral review. *Montgomery*, 136 S. Ct. at 725. Reasoning that the "'foundation stone' for *Miller*'s analysis" was "this Court's line of precedent holding certain punishments disproportionate when applied to juveniles," the Court held that *Miller* announced a new substantive rule because "[p]rotection against disproportionate punishment is the central *substantive* guarantee of the Eighth Amendment." *Id.* at 732 (emphasis added). The same analysis yields the opposite result here.

Johnson held that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." 135 S. Ct. at 2557.

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[3] It is undisputed that *Johnson* announced a new rule. *See* Pet. Br. 19-27; U.S. Br. 24.

Thus, "[i]ncreasing a defendant's sentence under the clause denies due process of law." *Ibid.* The foundation stone for this new rule was the Court's precedent holding that due process is violated by "a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Id.* at 2556 (citing *Kolender* v. *Lawson*, 461 U.S. 352, 357-58 (1983)).

This line of precedent is firmly rooted in procedural due process. "[T]he due process doctrine of vagueness ... incorporates notions of fair notice or warning ... [and] requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement." *Smith* v. *Goguen*, 415 U.S. 566, 572 (1974) (quotation marks omitted); *see also United States* v. *Batchelder*, 442 U.S. 114, 123 (1979) (due process requirement of fair notice extends to vague sentencing provisions); *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (holding that a statute is impermissibly vague if "men of common intelligence must necessarily guess at its meaning and differ as to its application").

The right to fair notice and protection against arbitrary enforcement are the key "procedural safeguards" of the Due Process Clause. *United States* v. *Petrillo*, 332 U.S. 1, 7 (1947). As this Court has explained, the "right to notice" has been part of "the central meaning of procedural due process" for "more than a century" and "protect[s] [life, liberty, and property] from arbitrary encroachment." *Fuentes* v. *Shevin*, 407 U.S. 67, 80-81 (1972); *see also Philip Morris USA* v. *Williams*, 549 U.S. 346, 353-54 (2007)

(explaining that the "fundamental due process concerns" of "risks of arbitrariness, uncertainty, and lack of notice" are essential parts of the Due Process Clause's "procedural limitations").

Indeed, it is hornbook law that the void-for-vagueness doctrine stems directly from the "core content of procedural due process," which "place[s] upon government the duty to give notice." Laurence H. Tribe, *American Constitutional Law* § 10-8, at 683 (2d ed. 1988); *see also* 3 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 17.8(h), at 151 (5th ed. 2012) (listing among requirements of procedural due process that "[s]tatutes must be reasonably clear, so that individuals have adequate notice"); 73 C.J.S. *Public Administrative Law and Procedure* § 219 (updated Dec. 2015) ("The void-for-vagueness doctrine, which is a procedural due process concept, embodies two central precepts: the right to fair warning of the effect of a governing statute or regulation and the guarantee against standardless law enforcement.").

The void-for-vagueness doctrine is thus concerned not with the "*substantive* authority and content" of the law, but with ensuring its "definiteness or certainty of expression." *Kolender*, 461 U.S. at 357 (emphasis added); *see also* Rex A. Collings, Jr., *Unconstitutional Uncertainty—An Appraisal*, 40 Cornell L. Rev. 195, 196-97 (1955) (explaining that "procedural due process cases" based on "uncertainty" and "obscure" statutory language "involve no question of whether the legislative body had a right to make the prohibition; the question is whether it so expressed the prohibition that the prospective defendant and the court which would try him can

understand the statute"). In other words, independent of what conduct the legislature may punish, the void-for-vagueness doctrine is "concerned with the *procedures* by which the [punishment] is determined." *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 52 (1991) (O'Connor, J., dissenting).

In short, the Constitution's procedural guarantees—not any substantive rights—are the exclusive source of the void–for-vagueness doctrine. Accordingly, as this Court has long held, vague criminal statutes "violat[e] an accused's rights under *procedural* due process." *Winters* v. *New York*, 333 U.S. 507, 509-10 (1948) (emphasis added); *Petrillo*, 332 U.S. at 7 (holding that the Constitution "has erected procedural safeguards" requiring laws to "clearly defin[e] [criminal] conduct"); *see also, e.g.*, *City of Chicago* v. *Morales*, 527 U.S. 41, 64 & n.35 (1999) (plurality opinion) (finding it "*unnecessary* to reach the question whether ... [loitering ordinance] [wa]s invalid as a deprivation of substantive due process" because it violated procedural "due process" by "afford[ing] too much discretion to the police and too little notice to citizens" (emphasis added)).

2. Because "[t]hese [process-based] considerations underlay the Court's holding," *Montgomery*, 136 S. Ct. at 733, the rule announced in *Johnson* is a quintessential "procedural due process" rule, *Mackey*, 401 U.S. at 692.

Johnson did not focus on "whether the residual clause covers this or that crime," but turned on the "pervasive disagreement about the nature of the *inquiry* one is supposed to conduct and the *kinds of factors* one is supposed to consider." 135 S. Ct. at 2560

(emphasis added). The residual clause was fatally flawed because it failed to establish a determinate principle for courts to apply in deciding what qualified as a violent felony. Its "abstract inquiry" "produce[d] more unpredictability and arbitrariness than the Due Process Clause tolerates" and thereby deprived defendants of "fair notice" of what the law proscribes. *Id.* at 2557-58, 2561.

As demonstrated above, these concerns about the lack of clarity in the residual clause are well-established principles of procedural due process. Because they provided the doctrinal basis for the Court's holding, *Johnson* necessarily established a procedural rule within the meaning of *Teague*.[4]

The conclusion that new rules based on principles of vagueness are procedural is hardly groundbreaking. In *Espinosa* v. *Florida*, the Court invalidated an aggravating factor (whether a murder was "especially wicked, evil, atrocious or cruel") used to determine whether a defendant should be sentenced to death under Florida's capital sentencing statute because it was "unconstitutionally vague" under the Eighth Amendment. 505 U.S. 1079, 1081-82 (1992) (per curiam). Due to lack of "sufficient guidance," no

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[4] *Johnson* did not purport to rest on the substantive component of the Due Process Clause. *Cf. Johnson*, 135 S. Ct. at 2567, 2570 (Thomas, J., concurring in judgment) ("vagueness doctrine is distinct from substantive due process"). And because *Johnson* expressed no concern that the residual clause swept in constitutionally protected conduct, the substantive due process concerns animating the overbreadth doctrine were not implicated. *See Vill. of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 & n.9 (1982) (distinguishing vagueness and overbreadth).

one could be sentenced to death based on this "invalid" factor, whether it was directly weighed by the jury or indirectly by the judge in deferring to the jury's recommendation. *Id.* at 1081-82. The Court subsequently concluded that *Espinosa*'s new rule should not be applied retroactively on collateral review. *Lambrix*, 520 U.S. at 526-27, 539-40. *Teague*'s exception for substantive rules "[p]lainly" had "no application" because *Espinosa* "'neither decriminalize[d] a class of conduct nor prohibit[ed] the imposition of capital punishment on a particular class of persons.'" *Id.* at 539 (quoting *Saffle*, 494 U.S. at 495); *see also Gray* v. *Netherland*, 518 U.S. 152, 170 (1996) (holding that petitioner's due-process-based "notice-of-evidence" claim was not a watershed procedural rule).[5]

In fact, since *Teague*, this Court has *never* held that a new constitutional rule based on the procedural due process guarantees of either the Fifth or Fourteenth Amendments constitutes a "substantive" rule subject to retroactivity on collateral review. To

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[5] Petitioner contends that *Johnson* must be "substantive" because the Court has previously "recognized claims for habeas relief on the basis that the statute of conviction was unconstitutionally vague." Pet. Br. 20 (citing *Goguen*, 415 U.S. 566; *In re Gregory*, 219 U.S. 210 (1911)). That the Court considered such claims in habeas cases predating *Teague* tells us nothing about the proper classification of *Johnson* today. In fact, neither *Goguen* nor *Gregory* even mentioned—much less "squarely addressed"—retroactivity. *Brecht* v. *Abrahamson*, 507 U.S. 619, 630-31 (1993). Moreover, *Goguen* announced no new rule, 415 U.S. at 572 (applying "settled principles"), and *Gregory denied* the vagueness claim, 219 U.S. at 214. In any event, neither case suggested that void-for-vagueness doctrine rests on *substantive* constitutional guarantees.

do so now would create a Frankenstein's monster, alienated from the constitutional roots of void-for-vagueness doctrine and the aims of this Court's retroactivity precedents. *See* Mary W. Shelley, *Frankenstein* 95 (Sever, Francis & Co. 1869) (1818) ("When I looked around I saw and heard of none like me.").

3. Petitioner and the government nonetheless contend that *Johnson* cannot be procedural because it "affect[s] substantive criminal law." Pet. Br. 17; U.S. Br. 13-14 (arguing that *Johnson* works a "substantive change in the law").[6] This effects-based analysis finds no support in *Teague* or this Court's subsequent application of its retroactivity framework. The Court, instead, has consistently focused on the constitutional *source* of the legal right vindicated by the new rule—not on whether its application produces a substantive or procedural *outcome*.

In *Montgomery*, this Court analyzed whether the new rule at issue was rooted in one of the Constitution's "substantive guarantees." 136 S. Ct. at 731. In so doing, the Court explicitly distinguished "a procedural requirement necessary to implement a substantive guarantee" from a "rule that regulates only

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[6] Most of the circuit cases petitioner cites (Pet. Br. 10-11 & n.3) are of no help to him, and hardly represent a "unanimous" view that *Johnson* established a "substantive" rule. *See, e.g.*, *In re Williams*, 806 F.3d 322, 325 (5th Cir. 2015) (rejecting argument that *Johnson* is substantive); *In re Gieswein*, 802 F.3d 1143, 1148-49 (10th Cir. 2015) (per curiam) (declining to consider whether *Johnson* has been made retroactive); *see also Woods* v. *United States*, 805 F.3d 1152, 1154 (8th Cir. 2015) (per curiam) (accepting government's concession without analysis); *Pakala* v. *United States*, 804 F.3d 139, 139-40 (1st Cir. 2015) (per curiam) (same).

the *manner of determining* the defendant's culpability." *Id.* at 734-35 (citation and alteration omitted). Ancillary procedural requirements, the Court explained, "d[o] not replace but rather giv[e] effect to ... substantive holding[s]." *Id.* at 735. The inverse is also true: The potential substantive effect of a procedural rule does not transform it into a substantive guarantee.

To be sure, a new procedural rule may "raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Summerlin*, 542 U.S. at 352. But virtually every rule prohibiting the government from "utiliz[ing] certain techniques or processes in enforcing concededly valid societal proscriptions on individual behavior," *Mackey*, 401 U.S. at 692, has the *potential* to be outcome-determinative in at least some, if not many, cases. That is precisely why our legal system includes these procedural protections. This Court has nonetheless held that "[n]ew rules of procedure ... generally do not apply retroactively" on collateral review. *Summerlin*, 542 U.S. at 352.

The Court has applied the same logic to procedural rules affecting the accuracy of sentencing. For instance, the Court has categorized rules designed to "avoi[d] ... potentially arbitrary impositions of the death sentence," *Beard* v. *Banks*, 542 U.S. 406, 416-20 (2004), and rules "designed" to "enhanc[e] ... the accuracy of capital sentencing," *Sawyer*, 497 U.S. at 241-45, as procedural rules despite their obvious effects on a defendant's ultimate sentence. As these cases teach, a rule regulating the manner of determining a defendant's sentence is every bit as "procedural" as a rule regulating "the manner of determin-

ing the defendant's culpability." *Summerlin*, 542 U.S. at 353 (emphasis omitted).

By invalidating the residual clause, *Johnson* merely regulated the manner of determining whether a defendant's prior conviction qualifies as a violent felony under ACCA. That is, *Johnson* requires the use of a framework that adequately specifies "the nature of the *inquiry* one is supposed to conduct and the *kinds of factors* one is supposed to consider." 135 S. Ct. at 2560 (emphasis added). Although *Johnson*'s new rule may well have the practical "*effect* of narrowing the scope of a criminal sentencing statute," U.S. Br. 14 (emphasis added), so too do many other procedural decisions insofar as they strike down criminal sentencing provisions—but that does not make them "substantive" within the meaning of *Teague*. *See infra* 42-43.

The government, in fact, admits that the rule announced in *Johnson* would be procedural if applied to *identical* language in the Sentencing Guidelines "because the Guidelines are part of the process for imposing sentence, rather than a set of substantive rules that alter the statutory boundaries of sentencing." U.S. Br. 38 n.9. But the residual clause is equally "part of the process for imposing [a] sentence," *ibid.*, and thus cannot be distinguished from the Guidelines on that basis. Moreover, even though the Guidelines are advisory, this Court has held that they nevertheless alter the default "boundaries of sentencing." *Ibid.*; *cf. Peugh* v. *United States*, 133 S. Ct. 2072, 2085-88 (2013) (holding that the Guidelines have "sufficient legal effect to attain the status of a 'law' within the meaning of the *Ex Post Facto* Clause"). The government cannot have it

both ways. As one of petitioner's *amici* forthrightly concedes, under the government's "definition of a rule of criminal procedure, *Johnson* would be such a rule in both ACCA cases and Guidelines cases." Br. of Fed. Pub. Cmty. Defs. 14, 16 (quotation marks omitted).

4. Because the new rule announced in *Johnson* is procedural, it can be applied retroactively only if it is a "watershed rul[e] of criminal procedure." *Teague*, 489 U.S. at 311. *Johnson* "plainly" does not meet this standard, *Williams*, 806 F.3d at 325, and neither petitioner nor the government (nor any of their *amici*) contends otherwise.

Johnson does not "'alter our understanding of the *bedrock procedural elements* essential to the fairness of [the sentencing] proceeding.'" *Tyler*, 533 U.S. at 665 (citation omitted). "Whatever one may think of the importance of [*Johnson*'s new] rule, it has none of the primacy and centrality of the rule adopted in *Gideon*[.]" *Saffle*, 494 U.S. at 495. *Johnson* is "much more limited in scope [than *Gideon*], and the relationship of that rule to the accuracy of the factfinding process is far less direct and profound." *Whorton*, 549 U.S. at 419.

C. This Court Should Reject Petitioner's Invitation To Vastly Expand The Definition Of "Substantive" Rules.

Rather than focusing on the constitutional basis of *Johnson*, petitioner pastes together isolated snippets from this Court's habeas cases and uses the term "substantive" loosely in an attempt to expand that category of rules far enough to include *Johnson*. But "substantive" is a legal term of art that derives

directly from Justice Harlan's exception for "substantive due process rules," a group of conduct-protecting rules conspicuously absent from the analysis of petitioner, his *amici*, and the government. Petitioner simply cannot squeeze *Johnson* into the narrow exception for substantive rules.

Petitioner thus resorts to the extreme view that *any* decision of this Court holding "a law ... unconstitutional" must be retroactively applicable on collateral review because it is as if the provision never really existed at all. Pet. Br. 1. That theory not only blinks reality, it would vastly expand the realm of new constitutional rules retroactively applicable in post-conviction proceedings and erode the distinction between direct appeal and collateral review.

1. "The category of substantive rules discussed in *Teague* originated in Justice Harlan's approach to retroactivity." *Montgomery*, 136 S. Ct. at 729. Justice Harlan believed that only "[n]ew 'substantive due process' rules" should apply retroactively on collateral review, *Mackey*, 401 U.S. at 692, and he illustrated this category of rules with specific "example[s]," *id.* at 692 n.7, citing *Street* v. *New York*, 394 U.S. 576, 578 (1969) (right to "free expression" requires decriminalizing flag burning); *Stanley* v. *Georgia*, 394 U.S. 557, 565 (1969) ("personal liberties" of free speech and privacy require decriminalizing possession of obscene matter); *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965) ("right of privacy" requires decriminalizing use of contraceptives by married individuals); *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) ("freedom to marry" and right to equal protection of the laws requires decriminalizing interracial marriage). Petitioner and his *amici* do not even

mention these cases, which lie at the heart of Justice Harlan's theory.[7]

Unlike these substantive due process cases, *Johnson* did not "set forth categorical constitutional guarantees that place certain criminal laws and punishments *altogether beyond* the State's power to impose." *Montgomery*, 136 S. Ct. at 729 (emphasis added); *see also* U.S. Br. 20-21 (acknowledging this standard). *Johnson* declared ACCA's residual clause unconstitutionally vague but never doubted Congress's authority to enhance the sentences of felons convicted of illegal possession of a firearm based on the commission of prior violent felonies. *See* 135 S. Ct. at 2563 ("Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony."). To the contrary, the Court suggested that Congress could do so with a statute that "require[s] gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*." *Id.* at 2561; *see also id.* at 2578 (Alito, J., dissenting) (observing that reading the residual clause to apply to "real-world conduct" would "avoid the constitutional problem").

Therefore, *Johnson* did not announce a substantive individual *right* to engage in the conduct punishable under the residual clause. *But see* Pet. Br. 13, 19. Nor did it declare such conduct "constitutionally immune from punishment." *U.S. Coin &*

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[7] The government cites *Griswold* and *Loving*, but only in discussing the background of *Teague*. *See* U.S. Br. 21.

Currency, 401 U.S. at 724.[8] Under *Johnson*, Congress "retains the power to increase punishments by prior felonious conduct." *Williams*, 806 F.3d at 325; *see also In re Rivero*, 797 F.3d 986, 989 (11th Cir. 2015) ("*Johnson* did not hold that Congress *could not* impose a punishment for [the] same prior conviction[s] in a statute with less vague language."). As Justice Scalia explained in *Sykes*, Congress could "quickly add what it wishes" to ACCA, so long as it does so with sufficient clarity. *Sykes* v. *United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).

In this regard, *Johnson* is similar to other decisions striking down laws for vagueness. In *FCC* v. *Fox Television Stations, Inc.*, the Court held that the FCC "gave no notice to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent," but created no constitutional right to broadcast indecency or nudity free from regulation. 132 S. Ct. 2307, 2318 (2012). Rather, the Court expressly stated that its "opinion leaves the [FCC] free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements." *Id.* at 2320. Likewise, in *Kolender*, the Court invalidated a criminal statute that required individuals to provide "credible and reliable identification" to the police upon being subjected to *Terry* stops, because the statute "encourage[d] arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order

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[8] Likewise, "possessing a firearm as a felon" is "unequivocally criminal conduct," Supp. U.S. Br. 18, *Johnson*, 135 S. Ct. 2551 (No. 13-7120), and remains so after *Johnson*.

to satisfy the statute." 461 U.S. at 360-61. But *Kolender* did not establish a constitutional right to withhold identification from the police when lawfully stopped. *Id.* at 361 n.10.

Petitioner and the government both admit, as they must, that *Johnson* does not "plac[e] a specific criminal punishment beyond Congress's power to impose." U.S. Br. 14, 30-31; Pet. Br. 24. They argue, however, that this inquiry is irrelevant because the *Ex Post Facto* Clause would prevent Congress from sentencing petitioner under a future amendment to ACCA. Pet. Br. 27; U.S. Br. 37-38. This is a distraction. The question is not whether a future amendment to ACCA could constitutionally apply to petitioner, but whether the new rule announced in *Johnson must* apply retroactively in post-conviction proceedings under *Teague*. Since *Teague*, the Court has consistently asked whether a new rule constrains Congress's power to punish certain "'primary, private individual conduct.'" *Teague*, 489 U.S. at 307 (citation omitted). *Johnson* did nothing of the sort.

2. *Johnson* similarly did not hold that the Constitution "prohibit[s] a certain category of punishment for a *class* of defendants *because of* their status or offense." *Penry*, 492 U.S. at 330 (emphasis added).

As the government recognizes, "[s]ubstantive penalty-restricting constitutional rules include decisions holding that the Eighth Amendment bars life without parole or the death penalty for certain classes of offenders." U.S. Br. 21. *Johnson* is entirely unlike these decisions, which held that certain punishments may *never* be constitutionally imposed on a particular class of individuals as defined by their

shared personal identity or common conduct. *See, e.g.*, *Roper* v. *Simmons*, 543 U.S. 551 (2005) (Eighth Amendment prohibits execution of juveniles); *Kennedy* v. *Louisiana*, 554 U.S. 407 (2008) (Eighth Amendment prohibits execution of child rapists). The "foundation stone" for these decisions is "[p]rotection against disproportionate punishment"—"the central *substantive* guarantee of the Eighth Amendment." *Montgomery*, 136 S. Ct. at 732 (emphasis added) (quotation marks omitted). These cases therefore "plac[e] a *substantive* restriction on the State's power." *Atkins* v. *Virginia*, 536 U.S. 304, 321 (2002) (emphasis added) (quotation marks omitted).

Johnson, by contrast, did not prohibit any category of punishment *at all*. "If Congress wanted" to "subjec[t] *all* repeat offenders to a 15-year mandatory minimum prison term," it could constitutionally—and "very easily"—do so. *James* v. *United States*, 550 U.S. 192, 230 (2007) (Scalia, J., dissenting).

Still trying to force a square peg into a round hole, petitioner and the government contend that *Johnson* prohibited an enhanced sentence for defendants "whose ACCA sentences depended on the residual clause." U.S. Br. 26; *accord id.* at 25-27; Pet. Br. 19. But that artificial definition of a protected "class"—which simply consists of those to whom the residual clause was applied, not a group of individuals who share an identity or engaged in the same conduct—distorts the meaning of this term. Indeed, under the government's circular definition, *every* new rule of constitutional law would apply to the "class" of defendants whose rights—whether procedural or substantive—would have been violated had the new rule applied at the time of their convic-

tion. That would render all new rules retroactive on collateral review. That is not the law, nor should it be.

3. Finally, *Johnson* did not "narrow the scope of [ACCA's residual clause] by interpreting its terms." *Summerlin*, 542 U.S. at 351 (citing *Bousley*, 523 U.S. at 620-21). In *Bousley*, the Court held that *Teague*'s bar to retroactive application of new rules on collateral review "is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress." 523 U.S. at 620. Because that holding has no application here, petitioner's and the government's extensive reliance on *Bousley* is misplaced.

In *Bailey* v. *United States*, this Court construed 18 U.S.C. § 924(c)(1) to determine the scope of "conduct [Congress] wished to reach," and concluded "that Congress intended 'use'" of a firearm to mean "active employment," rather than mere "proximity and accessibility." 516 U.S. 137, 143, 148, 150 (1995). Because *Bailey* determined that the "federal criminal statute [did] not reach certain conduct," anyone convicted under the broader definition of "use" was innocent of any conduct that Congress had intended to "make criminal." *Bousley*, 523 U.S. at 620-21.

Petitioner and the government correctly observe that *Bousley* "did not deem relevant the fact that Congress could later pass a law proscribing such possession." Pet. Br. 26; U.S. Br. 15. But this does not mean, as they suggest, that the question whether a rule "immunize[d] particular conduct from punishment or categorically prohibit[ed] particular penal-

ties," is irrelevant to the retroactivity analysis under *Teague*. Pet. Br. 25; *Williams*, 806 F.3d at 326 (rejecting this argument). As this Court explained in *Summerlin*, *Bousley* recognized a separate subcategory of substantive rules that are retroactively applicable on collateral review. 542 U.S. at 351-52.

Retroactivity in cases where the Court interprets the terms of the statute in furtherance of congressional intent is necessary because in "our federal system," "it is only Congress, and not the courts, which can make conduct criminal." *Bousley*, 523 U.S. at 620-21. Under this system, judicial decisions merely "explai[n] [the Court's] understanding of what the statute has meant continuously since the date when it became law." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994); *accord Bousley*, 523 U.S. at 625 (Stevens, J., concurring in part and dissenting in part) (*Bailey* "did not change the law" but "merely explained what § 924(c) had meant ever since the statute was enacted"). As a result, when the Court gives a narrowing construction to a statute, it does not declare that previously unlawful conduct is *now* lawful; it has no such power. The Court declares that such conduct was *never* unlawful because Congress *never* intended it to be. As the government recognizes, "separation-of-powers concerns" therefore arise when "judicial error in applying a statute" results in a "greater sentence than the legislature has authorized." U.S. Br. 30 (quotation marks omitted).

Johnson, by contrast, "did not interpret the ACCA in service of Congressional intent" and thus does not come within either the language or the separation-of-powers rationale of *Bousley*. *Williams*, 806 F.3d at 326. In fact, *Johnson* did not purport to

interpret the residual clause *at all*, but held instead that the clause "defies" construction because it is "hopeless[ly] indetermina[te]." 135 S. Ct. at 2558, 2562.

Johnson thus did not narrow the scope of the residual clause to cover only those predicate offenses that Congress intended to punish. To the contrary, *Johnson* recognized that there were "clearly risky crimes" that Congress obviously intended to "fal[l] within the provision's grasp," 135 S. Ct. at 2561; *see id.* at 2560 ("[S]ome crimes clearly pose a serious potential risk of physical injury to another."), yet it nevertheless invalidated the residual clause even as to those offenses. Indeed, this Court has explained that Congress, in amending ACCA to include the residual clause, sought "'a greater sweep and more effective use of this important statute.'" *Taylor* v. *United States*, 495 U.S. 575, 583 (1990) (citation omitted). And *Johnson* certainly did not hold that petitioner's predicate offenses—or those of the numerous other prisoners whose ACCA sentences would be set aside if he prevails—fell outside the range of conduct Congress meant to penalize. *See supra* 24-28. In short, *Johnson* recognized Congress's intent but *overrode* it based on the procedural requirements of the Due Process Clause.[9]

For these reasons, there is nothing "incongruous" about treating "statutory-construction decisions like

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[9] Implicitly conceding that *Johnson* did not "narro[w] the scope of ACCA as a matter of statutory construction," the government contends that *Johnson*'s "effect is comparable." U.S. Br. 31. As explained above, this effects-based analysis is inappropriate. *Supra* 30-33.

Begay and *Chambers*" differently from *Johnson*. *Contra* U.S. Br. 32-33; Pet. Br. 26 n.11. Those cases, unlike *Johnson*, directly implicated the separation-of-powers concerns underlying *Bousley* because lower courts had applied the residual clause to conduct that was "simply too unlike the provision's listed examples for [the Court] to believe that Congress intended the provision to cover it." *Begay* v. *United States*, 553 U.S. 137, 142 (2008); *accord Chambers* v. *United States*, 555 U.S. 122, 130 (2009) (conduct fell "outside the scope of ACCA's definition of 'violent felony'").

Because *Johnson* does not come within the bounds of *Bousley*'s framework, petitioner and the government seek to expand *Bousley* to encompass "any rule" that might be said to "'alte[r] the range of conduct or the class of persons that the law punishes,'" *regardless* of whether it was adopted to conform to congressional intent, based on out-of-context fragments from *Summerlin*. Pet. Br. 25 (quoting *Summerlin*, 542 U.S. at 353); U.S. Br. 25 (same). But nothing in *Summerlin* purported to extend the reach of *Bousley*. Quite the opposite: The Court explicitly recognized that *Bousley* concerned rules holding that "a 'statute does not reach certain conduct' or 'mak[e] conduct criminal,'" and thus is limited to "decisions that narrow the scope of a criminal statute *by interpreting its terms*." *Summerlin*, 542 U.S. at 351, 353 (alteration omitted) (emphasis added) (quoting *Bousley*, 523 U.S. at 620-21).

Summerlin actually proves that *Johnson*'s new rule is not "substantive." There, the Court held that *Ring* v. *Arizona*, 536 U.S. 584 (2002)—which invalidated a capital sentencing statute based on the Sixth

Amendment jury trial right—was "properly classified as procedural." *Summerlin*, 542 U.S. at 353. *Ring*, like other procedural decisions, had "substantive" effects in the general sense that it invalidated state capital sentencing statutes. *See* 536 U.S. at 607-08 & n.6 (citing capital sentencing statutes); *id.* at 620 (O'Connor, J., dissenting) ("The Court effectively declares five States' capital sentencing schemes unconstitutional."). Yet *Ring* "could not have" "alter[ed] the range of conduct ... subjected to the death penalty" because "it rested entirely on the Sixth Amendment's jury-trial guarantee, a provision that has nothing to do with the range of conduct a State may criminalize." *Summerlin*, 542 U.S. at 353. The procedural component of due process upon which *Johnson* rests likewise places no limits on the range of punishable conduct.

4. Unable to wedge *Johnson* into any of the recognized subcategories of "substantive" rules, petitioner and his supporters insist that this Court necessarily declares a new substantive rule that applies retroactively on collateral review *whenever* it holds a law to be "unconstitutional," because it is as if the relevant law never existed at all. Pet. Br. 1, 2, 26 n.11; U.S. Br. 28 & n.6; *see also* Br. of Scholars of Fed. Courts & Sentencing 11 ("Justice Harlan's exception for substantive rules includes *all* rules invalidating criminal statutes[.]"). That astounding assertion, if accepted, would vastly expand the scope of retroactivity on collateral review.

To be sure, Justice Harlan acknowledged that the "writ has historically been available for attacking convictions" on constitutional grounds. *Mackey*, 401 U.S. at 692-93 & n.8 (citing *Ex parte Siebold*, 100

U.S. 371 (1880); *Crowley* v. *Christensen*, 137 U.S. 86 (1890); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886)). But there are several reasons why this historical reference does not support petitioner's radical theory.

First, Justice Harlan fundamentally disagreed with the assumption, almost universally accepted at the time of these decisions, that "habeas courts should apply current constitutional law to habeas petitioners before them." *Mackey*, 401 U.S. at 686. In this critical respect, his opinions, adopted in *Teague*, intentionally "charted a different approach to the retroactivity of 'new rules'" than had traditionally been applied. U.S. Br. 19.

Second, Justice Harlan did not reference historical habeas practice on a standalone basis; he explicitly tied it to his exception for rules placing conduct "beyond the power of the criminal law-making authority to proscribe," explaining that the writ had traditionally been available "on *such* grounds." *Mackey*, 401 U.S. at 692-93 (emphasis added).

The cases cited in (or arguably encompassed by) footnote eight of *Mackey* fit comfortably within that model. *See* Pet. Br. 26, 29-32; Anthony G. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 384 n.30 (1964) (discussing cases involving "constitutionally *unauthorized* statute[s]" (emphasis added)). Each considered whether the underlying conduct was protected by a substantive constitutional guarantee or "within the power of Congress to prescribe punishment." *Gregory*, 219 U.S. at 217 The government's authority to proscribe was the central issue in *Siebold*, where the Court considered whether federal election-fraud statutes

were within Congress's power to regulate under Article I, § 4. 100 U.S. at 382, 383. And the scope of legislative authority was front and center in *Ex parte Yarbrough*, which held that, under the Fifteenth Amendment, Congress possessed the "power by appropriate laws to secure [congressional] election[s] from the influence of violence, of corruption, and of fraud." 110 U.S. 651, 657 (1884).

Both *Yick Wo* and *Crowley* assessed whether the legislature had the power to enact criminal laws that allegedly violated petitioners' *substantive* right to equal protection under the Fourteenth Amendment. *See Yick Wo*, 118 U.S. at 374 (right to equal protection prohibits imprisonment based on "hostility to the race and nationality to which the petitioners belong"); *Crowley*, 137 U.S. at 94 (equal protection not violated by licensing regime for liquor store). Indeed, the essential distinction between the differing outcomes in these cases was the fact that the regulated business in *Crowley* was "one that may be entirely prohibited." 137 U.S. at 94.

Petitioner misleadingly suggests that the government's power to proscribe was not at issue in *Gregory* (Pet. Br. 34), but there the Court denied habeas review precisely because the challenged statute did *not* "include conduct which lies outside the range of legislative ... power" but instead "embrac[ed] a class of transactions which the legislature is competent to condemn." 219 U.S. at 214. This critical aspect of *Gregory* is not erased by the fact that the Court *also* rejected petitioner's argument that the

statute was "so uncertain as to make the prohibition nugatory." *Ibid.*[10]

Third, these cases must be read within their historical context, which counsels strongly against petitioner's broader understanding of their significance. "[T]hroughout most of this period *federal criminal convictions were not appealable*." Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 473 (1963). Congress did not give this Court jurisdiction to review such convictions until 1891. *See* Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157, 201 & n.220 (1960). Indeed, with the exception of a one-year interlude during Reconstruction, the Court also lacked jurisdiction to hear appeals from habeas decisions of the lower courts until 1885. *See Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 512-15 (1868) (explaining congressional grant and subsequent revocation of appellate habeas jurisdiction); Act of Mar. 3, 1885, ch. 353, 23 Stat. 437 (restoring such jurisdiction). Thus, for most of the 19th centu-

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[10] Petitioner also implies that Justice Harlan cited *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874), favorably as a case involving a "substantive" rule. *See* Pet. Br. 29, 34-35. But Justice Harlan identified that case as an "example" of a decision that "subjected" the "concept of jurisdiction" in habeas law to "considerable strain." *Fay* v. *Noia*, 372 U.S. 391, 450-51 (1963) (Harlan, J., dissenting). In any event, *Lange* found that the trial court exceeded its authority by imposing a penalty beyond what Congress intended, in violation of the Double Jeopardy Clause. *See* 85 U.S. (18 Wall.) at 170, 178; *see also* Pet. Br. 32 (collecting similar cases). Its retroactive application thus comports with *Bousley*.

ry, the Court lacked any authority to review federal criminal convictions except by means of an *original* writ of habeas corpus. *See* Bator, *supra*, at 473 (noting resultant "tremendous expansive pressure on the [Court's] habeas corpus jurisdiction").

The habeas cases from this era had no occasion to address retroactivity on direct appeal versus collateral review because there *was* no such distinction in this Court's jurisdiction; when the Court exercised its habeas authority, it was reviewing the judgment of conviction *itself*. These cases inquired instead whether the petitioner could be "discharged from imprisonment by this court on *habeas corpus*, although it ha[d] no appellate jurisdiction by writ of error over the judgment." *Siebold*, 100 U.S. at 374; *see also, e.g.*, *Yarbrough*, 110 U.S. at 653. The Court resolved that question by declaring its habeas review "appellate in its character," *Siebold*, 100 U.S. at 374, and not an exercise of "original jurisdiction" under Article III, § 2. For these reasons, any retroactive application of new constitutional rules in these "appellate" cases is more analogous to the modern practice of retroactive application of new rules on direct review, not retroactivity on collateral review under *Teague*'s first exception.

Petitioner nonetheless repeats the refrain that "'[a]n unconstitutional act is not a law,'" Pet. Br. 26 n.11 (quoting *Norton* v. *Shelby Cty.*, 118 U.S. 425, 442 (1886)), and "'is as no law,'" *id.* at 1, 13, 19-20, 22 n.7, 27 n.11, 30 (quoting *Montgomery*, 136 S. Ct. at 731 (quoting *Siebold*, 100 U.S. at 376)). But this Court warned more than 75 years ago, specifically referring to *Norton*, that these "broad statements as to the effect of a determination of unconstitutionality

must be taken with qualifications" because "it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." *Chicot Cty. Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 374 (1940); *see also Montgomery*, 136 S. Ct. at 731 (*Siebold* does not "directly control"); Bator, *supra*, at 473-74 & n.77 ("[A]fter appeal in federal criminal cases was authorized the Court repudiated the doctrine of *Siebold*[.]") (collecting cases). Indeed, Justice Harlan himself rejected this argument: "To argue that a conclusion reached by ... 'inferior' courts is somehow forever erroneous because years later this Court took a different view of the relevant constitutional command carries more emotional than analytic force." *Mackey*, 401 U.S. at 689-90.

Petitioner next suggests that, under *Montgomery*, any "'penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional.'" Pet. Br. 21 (quoting *Montgomery*, 136 S. Ct. at 731). But petitioner takes this statement entirely out of context. The Court continued: "There is no grandfather clause that permits States to enforce *punishments the Constitution forbids*. To conclude otherwise would undercut the Constitution's *substantive guarantees*." *Montgomery*, 136 S. Ct. at 731 (emphasis added). Lest there be any doubt, the Court made clear that this passage merely restates Justice Harlan's "point ... that '[no] circumstances call more for the invocation of a rule of complete retroactivity' than when 'the conduct being penalized is constitutionally *immune* from punishment.'" *Ibid.* (second alteration in original) (empha-

sis added) (quoting *U.S. Coin & Currency*, 401 U.S. at 724). Because *Johnson* did not render any conduct constitutionally immune from punishment, that exception has no application here.

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Stretching the definition of a substantive rule beyond its current boundaries to encompass *Johnson*, as petitioner, his *amici*, and the government advocate, would erode the important principles underlying *Teague*, which struck a careful balance between the need for finality in our criminal justice system and the legitimate purposes of habeas review. This Court has long held that a new rule should not apply on collateral review if it does not squarely "fa[l] within one of the two narrow exceptions to the nonretroactivity principle" in *Teague*. *Caspari* v. *Bohlen*, 510 U.S. 383, 390 (1994). *Johnson* fits into neither. The Court should remain true to Justice Harlan's vision and hold that *Johnson* announced a new procedural rule that may not be applied in post-conviction proceedings.

D. Retroactive Application Of *Johnson* On Collateral Review Would Bring Sweeping And Problematic Consequences.

Aside from contradicting this Court's *Teague* jurisprudence, retroactive application of *Johnson* on collateral review would impose substantial costs on the criminal justice system and society at large. Foremost, such a holding would produce an unjustified windfall for the many violent offenders sentenced under the residual clause whose conduct "clearly [fell] within the [residual clause's] grasp."

Johnson, 135 S. Ct. at 2561. Further, to the extent *Johnson*'s analysis foreshadows the fate of similarly worded Sentencing Guidelines and statutes, a determination that it applies retroactively would soon generate even more disruption.

1. From 2008 to 2014 alone, more than 4,000 defendants were sentenced under ACCA. U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics*, tbl. 22 (2008-2014). The proportion of these offenders who have at least one residual-clause predicate offense "is unlikely to be a trivial number in light of the many reported appellate decisions on residual-clause issues." Supp. U.S. Br. 49, *Johnson*, 135 S. Ct. 2551 (No. 13-7120). Many of these predicates do not implicate the notice problems at issue in *Johnson*. *See* 135 S. Ct. at 2560 (recognizing that "there will be straightforward cases under the residual clause"); *Begay*, 553 U.S. at 154 (Scalia, J., concurring in judgment) ("For some crimes, the severity of the risk will be obvious."). Indeed, before declaring the residual clause impermissibly vague, *this Court* held that the clause gave fair notice that vehicular flight from law enforcement, *Sykes*, 131 S. Ct. at 2274, and attempted burglary, *James*, 550 U.S. at 209, were violent felonies. Applying *Johnson* retroactively on collateral review would nonetheless free the significant number of career offenders who unquestionably had sufficient notice that their prior convictions subjected them to enhanced sentences—including those who committed the very crimes at issue in *Sykes* and *James*.

That is not only unjust but deeply troubling, given the types of crimes that courts have found to qualify as "violent felon[ies]" under the residual clause.

Criminals with predicate felonies for "attempted arson, attempted kidnapping, solicitation to commit aggravated assault, possession of a loaded weapon with the intent to use it unlawfully against another person, possession of a weapon in prison, [and] compelling a person to act as a prostitute" would be eligible for significant sentence reductions. *Johnson*, 135 S. Ct. at 2581 & nn.3-8 (Alito, J., dissenting) (footnotes omitted). [11] Retroactive application of *Johnson* would not only release these dangerous criminals from prison sooner than Congress intended, but simultaneously impose considerable strain and costs on the criminal justice system by requiring hundreds or even thousands of new sentencing hearings. The "release [of] criminals from jail" is a "serious interference with the corrective process" "justified only by necessity," which is absent here. *Mackey*, 401 U.S. at 679.

Resentencing these violent felons would be far from straightforward. *Contra* Br. of Scholars of Fed. Courts & Sentencing 27-33. Many cases, like this one, would require supplemental briefing to determine whether the *Johnson* claim has been preserved and whether an enhanced sentence is independently warranted under the elements clause. *See infra* 55-60. Even after those questions are resolved, courts must recalculate the Guidelines range and determine

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[11] Other serious crimes held to qualify under the residual clause include: assault with intent to commit murder, *United States* v. *Jones*, 673 F.3d 497, 506 (6th Cir. 2012); child molestation, *United States* v. *Scudder*, 648 F.3d 630, 634 (8th Cir. 2011); sexual assault, *United States* v. *Terrell*, 593 F.3d 1084, 1091 (9th Cir. 2010); and attempted rape, *Dawson* v. *United States*, 702 F.3d 347, 352-53 (6th Cir. 2012).

an appropriate sentence. *See*, *e.g*, Testimony of Hon. Irene M. Keeley on Retroactivity of Drug Guideline Amendment, U.S. Sentencing Comm'n (June 10, 2014), at 11, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140610/Testimony_Keeley.pdf (explaining "extremely serious administrative problems" and costs of retroactive application of crack-cocaine sentencing amendments).[12]

2. Applying *Johnson* retroactively would also undermine the decisions of countless prosecutors who "reli[ed] on this Court's [ACCA] holdings." *See* Supp. U.S. Br. 50, *Johnson*, 135 S. Ct. 2551 (No. 13-7120). Before *Johnson*, "a prosecutor who had an open-and-shut case on a Section 922(g)(1) violation for a three-time felon believed to have committed more serious crimes might have been content to accept a guilty plea on the Section 922(g)(1) charge in light of the ACCA's 15-year minimum sentence," rather than expending additional time and taxpayer money prosecuting the more serious crimes. *Ibid.* These "charging decisions" would be irreparably "unravel[ed]" if *Johnson* were applied retroactively. *Ibid.*

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[12] Policy judgments about the wisdom of mandatory minimum sentences should be left to Congress, which is currently considering legislation to retroactively lower ACCA's minimum sentence to 10 years, and which can provide sufficient resources to allow courts to effectively manage the release of thousands of offenders. *See* Sentencing Reform and Corrections Act, S. 2123, 114th Cong. § 105 (2015); Sentencing Reform Act, H.R. 3713, 114th Cong. § 6 (2015).

It would also have a profound impact going forward. Unconstitutional vagueness may take years to "manifes[t] itself" through "the inability of later [judicial] opinions to impart ... predictability." *Johnson*, 135 S. Ct. at 2562. In the meantime, judges and prosecutors will be forced to make sentencing and charging determinations by guessing whether their decisions might decades later be upended by a void-for-vagueness ruling—even when the conduct at issue is plainly within the scope of the statute and the substantive power of the legislature to punish.

3. Although *Johnson* rejected the suggestion that its holding put other federal and state laws on the chopping block, *see* 135 S. Ct. at 2561, lower courts have *already* applied *Johnson* to invalidate similar provisions. Applying *Johnson* retroactively could thus undermine countless other convictions and sentences for dangerous conduct that Congress clearly intended to punish.

For instance, several lower courts have ruled that, under *Johnson*, the residual clause of Section 4B1.2(a) of the Sentencing Guidelines, which defines "crime of violence" for purposes of (among other things) the Guidelines' career-offender enhancement, is unconstitutional. *See, e.g.*, *United States* v. *Madrid*, 805 F.3d 1204, 1210-11 (10th Cir. 2015) ("If one iteration of the clause is unconstitutionally vague, so too is the other."); *cf.* Br. of Fed. Pub. Cmty. Defs. 14, 16 (arguing that this Court's decision on *Johnson* retroactivity should apply equally to the Guidelines). The retroactive application of a rule striking down Section 4B1.2(a) on vagueness grounds could have extensive disruptive effects: Between 2008 and 2014, more than *16,000* defendants were sentenced

as career offenders under the Guidelines. *Sourcebook of Federal Sentencing Statistics*, tbl. 22 (2008-2014).

The same story could play out with other federal and state statutes. For example, two district courts have ruled that a similar residual clause in 18 U.S.C. § 924(c)(3)(B), which prohibits the use, carrying, or possession of a firearm during a crime of violence, is void for vagueness. *United States* v. *Bell*, No. 15-cr-00258-WHO, 2016 WL 344749, at *12 (N.D. Cal. Jan. 28, 2016); *United States* v. *Edmundson*, No. PWG-13-15, 2015 WL 9311983, at *5 (D. Md. Dec. 23, 2015), as amended Dec. 30, 2015.

Two courts of appeals have likewise relied on *Johnson* to invalidate 18 U.S.C. § 16(b), which defines "crime of violence" for purposes of numerous federal statutes. *See United States* v. *Vivas-Ceja*, 808 F.3d 719, 720 (7th Cir. 2015); *Dimaya* v. *Lynch*, 803 F.3d 1110, 1120 & n.17 (9th Cir. 2015). In the immigration context, Section 16(b) supplies the definition of "crime of violence" used to determine what constitutes an "aggravated felony," 8 U.S.C. § 1101(a)(43)(F), rendering an alien deportable and ineligible for certain forms of deportation relief, *id.*

§§ 1227(a)(2)(A)(iii), 1158(b)(2)(B)(i), 1229b(a)(3).[13] Applying *Johnson* retroactively could thus invite a host of collateral attacks on many other types of final criminal judgments, as well as immigration removal orders.

II. THE DISTRICT COURT DID NOT ERR IN DENYING PETITIONER'S SECTION 2255 MOTION.

This Court also granted certiorari on the question whether the district court erred in denying petitioner's Section 2255 motion. Because petitioner's conviction for robbery qualifies as a violent felony under ACCA's elements clause, and because his *Johnson* claim is procedurally defaulted thrice over, petitioner is not eligible for post-conviction relief. This Court should affirm the Eleventh Circuit's denial of a COA on these grounds, thus avoiding any constitutional issues. *See Bond* v. *United States*, 134 S. Ct. 2077, 2087 (2014) (noting "'well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case'" (citation omitted)); *cf. Montgomery*, 136 S. Ct.

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[13] In *United States* v. *Mendoza-Lopez*, 481 U.S. 828 (1987), the Court held that an alien prosecuted for illegal reentry may collaterally attack the validity of the underlying removal order. *Id.* at 839. Lower courts have applied *Teague* to such attacks. *See, e.g.*, *United States* v. *Martinez*, 843 F. Supp. 2d 136, 137-38 (D. Mass. 2012); *United States* v. *Ortega-Cordero*, No. 10cr2914, 2011 WL 6012596, at *2 (S.D. Cal. Dec. 1, 2011); *see also Alvarenga-Villalobos* v. *Ashcroft*, 271 F.3d 1169, 1172-73 (9th Cir. 2001) (applying *Teague* to collateral attack of removal order in habeas proceeding).

at 729 (retroactivity for substantive rules is a "constitutional command").

A. Petitioner's Robbery Conviction Qualifies As A Violent Felony Under The Elements Clause.

In urging reversal, petitioner maintains that his conviction for Florida strong-arm robbery does not qualify as a violent felony under the elements clause. Pet. Br. 36-37. The government seeks a remand for the Eleventh Circuit to decide whether the conviction satisfies that test (intimating that it does). U.S. Br. 43. The Court can affirm without remanding, however, because Florida law shows that strong-arm robbery (as its name suggests) plainly constitutes a violent felony under the elements clause.

The elements clause defines a violent felony as a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). "[P]hysical force" means "*violent* force"—that is, "force capable of causing physical pain or injury to another person." *Curtis Johnson* v. *United States*, 559 U.S. 133, 140 (2010).

At the time of petitioner's conviction in 1996, robbery under Florida law readily satisfied these requirements. A necessary element of the relevant Florida statute is "the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1); *see* U.S. Br. 44 (explaining petitioner was not convicted under "sudden snatching" statute). As the Florida Supreme Court explained nearly a century ago, the "criterion which distinguishes" robbery from larceny "is the violence which precedes the taking." *Montsdoca* v.

State, 93 So. 157, 159 (Fla. 1922); *see also* U.S. Br. 45-46. In Florida, "[t]here can be no robbery *without* violence." *Montsdoca*, 93 So. at 159 (emphasis added). "[T]he force that is required to make the offense a robbery is such force as is actually sufficient *to overcome the victim's resistance*." *Ibid.* (emphasis added); *Robinson* v. *State*, 692 So. 2d 883, 886 (Fla. 1997) ("[T]o amount to robbery, the perpetrator must employ more than the force necessary to remove the property from the person[.]"); *see also McCloud* v. *State*, 335 So. 2d 257, 258-59 (Fla. 1976) (holding that defendant committed robbery, not larceny, because taking was accompanied by "a contemporaneous or precedent force, violence, or ... inducement of fear for one's physical safety").

The Eleventh Circuit assumed, without deciding, that petitioner "pleaded guilty to robbery at a time when mere snatching sufficed," JA.115a, because it believed that the Florida Supreme Court did not make clear that robbery requires the use of significant physical force until *Robinson* was decided in 1997. The Florida Supreme Court, however, established that principle in *Montsdoca*—more than 70 years before petitioner's conviction. *Robinson* merely corrected intervening lower court decisions that "misconstrued *McCloud*," U.S. Br. 45-46, and those decisions did not even apply in the judicial district in which petitioner was convicted.

Petitioner's alternative argument—that "putting in fear" does not require use or threat of violent force—does not withstand analysis either. *See Montsdoca*, 93 So. at 159 ("It is robbery to create in the person to be despoiled a reasonable apprehension of violence[.]"); U.S. Br. 45 ("[T]he fear contemplated

by the Florida robbery statute is the fear of death or great bodily harm." (quotation marks omitted)). Petitioner cites the *dissent* in *Montsdoca* for the proposition that a threat to accuse the victim of sodomy would fall within the statute. Pet. Br. 37 (citing 93 So. at 162 (Browne, C.J., dissenting)). The *majority*, however, denounced that theory as "an excrescence on the law" with "no foundation of principle." *Montsdoca*, 93 So. at 159.

Because Florida strong-arm robbery was a violent felony under the elements clause when petitioner pleaded guilty to that crime, the denial of a COA—and, ultimately, petitioner's sentence—was correct.

B. PETITIONER PROCEDURALLY DEFAULTED HIS *JOHNSON* CLAIM.

Even if this Court were to decide that *Johnson* applies retroactively on collateral review, it should affirm the Eleventh Circuit's denial of a COA because petitioner "doubl[y] ... default[ed]" any void-for-vagueness challenge to his sentence by failing to raise it either at sentencing or on direct review. *United States* v. *Frady*, 456 U.S. 152, 162, 167 (1982). Petitioner did not even raise a vagueness challenge in his Section 2255 motion, *see* U.S. Br. 39, which is a further, independent procedural bar, *see United States* v. *Durham*, 795 F.3d 1329, 1331 (11th Cir. 2015) (en banc) (per curiam) (allowing supplemental briefing based on intervening Supreme Court decisions on direct appeal, but not on collateral review). He has made no attempt to "establis[h] 'cause' for the waiver." *Reed* v. *Farley*, 512 U.S. 339, 354

(1994) (quoting *Wainwright* v. *Sykes*, 433 U.S. 72, 84 (1977)).[14]

A procedurally defaulted "claim may be raised in habeas only if the defendant can first demonstrate either cause and actual prejudice, ... or that he is actually innocent." *Bousley*, 523 U.S. at 622 (quotation marks omitted); *see also Murray* v. *Carrier*, 477 U.S. 478, 494, 496 (1986); *Wainwright*, 433 U.S. at 87. Petitioner has not attempted to—and cannot—meet either standard.

First, petitioner cannot establish cause. "While [this Court has] held that a claim that 'is so novel that its legal basis is not reasonably available to counsel' may constitute cause for a procedural default, petitioner's claim does not qualify as such." *Bousley*, 523 U.S. at 622 (citation omitted). "The claim's legal basis is hardly novel: Justice Scalia ha[d] been suggesting ACCA is unconstitutionally vague for the last eight years, and the void for

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[14] Petitioner does not dispute this. *See* Pet. Br. 6. Instead, he asserts that the government waived any procedural objections at the certiorari stage. Pet. Br. 36 n.13 (citing Sup. Ct. R. 15). Not so. *First*, Rule 15 is "permissive rather than mandatory." *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1340 (2011) (Scalia, J., dissenting). *Amicus* is thus free to raise petitioner's procedural default in defense of the judgment, and this Court is likewise free to consider it. *Second*, the government has not affirmatively forgone this argument. Although the United States opposed plenary review, it urged the Court to "grant certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Johnson*," at which point it could have raised procedural default. Mem. for the U.S. 3. *Third*, procedural default is "fairly included," Sup. Ct. R. 14.1(a), within the first question presented. Pet. i.

vagueness doctrine is nothing new." Leah M. Litman, *Residual Impact: Resentencing Implications of Johnson's Potential Ruling on ACCA's Constitutionality*, 115 Colum. L. Rev. Sidebar 55, 66 (2015). Nor is the claim "so obvious that counsel was inept and thus constitutionally ineffective for not making it." *Id.* at 67 n.62.

Second, petitioner has no claim of actual innocence. "'[A]ctual innocence' means factual innocence, not mere legal insufficiency," *Bousley*, 523 U.S. at 623, and the Court has applied this exception only where the petitioner alleges actual innocence of the crime of conviction, *see Schlup* v. *Delo*, 513 U.S. 298, 321 (1995), or actual innocence of a capital sentence, *see Sawyer* v. *Whitley*, 505 U.S. 333, 336 (1992). Petitioner comes within neither category.[15]

Petitioner's triple procedural default is a complete bar to relief on the basis of *Johnson*. The question is not whether *Johnson*'s retroactivity is reasonably debatable, *cf.* Pet. Br. 35; U.S. Br. 40, but whether "the district court's assessment of the constitutional claims" before it was "debatable or wrong," *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000). Petitioner makes no argument that the disposition of those claims—which did *not* include a *Johnson* claim—was erroneous. As the government recognizes, the Eleventh Circuit's subsequent denial of the COA "was correct." U.S. Br. 39. The judgment can and should be affirmed on that ground.

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[15] The lower courts are split on whether this exception extends to non-capital sentences, *see Spence* v. *Superintendent*, 219 F.3d 162, 171 (2d Cir. 2000) (collecting cases), but this Court has never held that it does.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 15-6418

IN THE

Supreme Court of the United States

GREGORY WELCH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF THE FEDERAL PUBLIC AND COMMUNITY DEFENDERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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[Additional Parties Listed in Appendix]

QUESTIONS PRESENTED

I. Whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), announced a new substantive rule of constitutional law that applies retroactively to cases on collateral review.

II. Whether petitioner's prior Florida conviction for robbery qualifies as a "violent felony" supporting sentence enhancement under the ACCA, 18 U.S.C. § 924(e)(2)(B).

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae, Federal Public and Community Defenders in the United States, have offices in 91 of the 94 federal judicial districts. *Amicus curiae*, the National Association of Federal Defenders, formed in 1995, is a nationwide, non-profit, volunteer organization whose membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. *Amici curiae* represent tens of thousands of individuals in federal court each year, including thousands who are facing or serving sentences under the residual clause of the Armed Career Criminal Act or the Career Offender Guideline. *Amici* therefore have both particular expertise and interest in the subject matter of this litigation. The issues presented and their broader implications are of great importance to our work and the welfare of our clients.

SUMMARY OF ARGUMENT

In *Johnson v. United* States, 135 S. Ct. 2551 (2015), this Court held that the residual clause in the definition of "violent felony" in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague. *Amici* agree with both the

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[1] The parties to the case, including *amicus* appointed by the Court, have consented to the filing of this brief and copies of letters of consent have been lodged with the Clerk of the Court. Sup. Ct. R. 37.2(a). No counsel for a party authored any part of this brief, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

Petitioner and the United States that *Johnson* announced a new substantive rule that therefore applies retroactively to cases on collateral review. In footnote 9 of its brief, however, the government suggests a different result for those whose sentences were increased under the identical clause of the Career Offender Guideline, U.S.S.G. § 4B1.2(a)(2).

Amici write principally in response to footnote 9. The government first states that "*Johnson* did not address whether its holding applies to the Guidelines." As explained below, the Court's constitutional holding in *Johnson* applies with equal force to the identically worded and interchangeably interpreted residual clause in the Career Offender Guideline.

The government also states that "*Johnson* is not entitled to retroactive effect" in Guidelines cases, and asserts that this is so because "the Guidelines are part of the process for imposing sentence, rather than a set of substantive rules that alter the statutory boundaries." The government's claim squarely conflicts with circuit precedent and its own position that this Court's ACCA-narrowing decisions are retroactive in ACCA cases and Guidelines cases alike. Moreover, the definitions of "procedural" and "substantive" rules that the government uses to support its newfound position are legally unsound and unnecessary to the decision in this case.

Amici therefore respectfully request that the Court not endorse the government's novel position or definitions in any way. The Court should decide this case under well-settled retroactivity principles, and, without presuming the outcome in this case, in a

manner that does not suggest a different result in the Guidelines context.

Amici also ask the Court to definitively resolve the issue of *Johnson*'s retroactivity in the Guidelines context this Term. There is an ever-shortening one-year statute of limitations, requiring all federal prisoners to file any *Johnson*-based § 2255 motions by June 26, 2016—one year from the date *Johnson* was decided. Reflecting the understanding that ACCA decisions apply retroactively in both ACCA and Guidelines cases alike, the lower courts are now staying both ACCA and Guidelines cases pending a decision here. Because the government continues to advance its newfound litigation position in the lower courts, an affirmative holding in this case will not definitively resolve the retroactivity issue in Guidelines cases until after the expiration of the one-year statute of limitations.[2] Given the looming statute of limitations, the Court should resolve the issue of *Johnson*'s retroactivity in the Guidelines context this Term, for many of the same reasons it granted *certiorari* and expedited briefing in this case.

Amici are aware of two cases, one pending in this Court and the other forthcoming, that provide an opportunity to definitively resolve *Johnson*'s retroactivity in the Guidelines context: *In re Rivero*, No. 15-7776 (S. Ct. filed Jan. 14, 2016), an original habeas matter in which the Court has ordered a response from the United States (due March 2, 2016), and *United States v. Alfrederick Jones*, No. 14-2882

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[2] While no court of appeals has definitively resolved the issue, the courts are reaching divergent conclusions in *dicta* and in non-precedential orders.

(3d Cir. reh'g denied Jan. 22, 2016), a forthcoming petition for *certiorari* from the Third Circuit's denial of a certificate of appealability. *Amici* respectfully urge the Court to accept both cases and decide this important issue this Term.

ARGUMENT

I. *Johnson*'s Holding Applies To The Identical Residual Clause Of The Guidelines.

The government states that "*Johnson* did not address whether its *holding* applies to the Guidelines." U.S. Br. 38 n.9 (emphasis added). But the absence of such an express statement does not mean the question is open. While the Court held that the residual clause in the definition of "violent felony" in the ACCA, 18 U.S.C. § 924(e)(2)(B)(ii), is void for vagueness, the Court's constitutional holding applies with equal force to the identically-worded and interchangeably interpreted residual clause in the definition of "crime of violence" in the Career Offender Guideline, U.S.S.G. § 4B1.2(a)(2).

This conclusion is compelled by *Johnson* itself, is reinforced by the residual clause jurisprudence of this Court and the lower courts, and is the government's national litigation position: "*Johnson*'s constitutional holding regarding ACCA's residual clause applies to the identically worded Guidelines residual clause" because it "uses the same language that *Johnson* held 'produces more unpredictability and arbitrariness than the Due Process Clause tolerates.'" Supplemental Brief for United States at 6-7, United States v. Pagan-Soto, No. 13-2243 (1st

Cir. Aug. 11, 2015) (quoting *Johnson*, 135 S. Ct. at 2558).[3]

A holding is the "necessary" and "pivotal" logic that results in a decision in the case. *Black's Law Dictionary* (10th ed. 2014) (defining "holding" as "a court's determination of a matter of law pivotal to its decision"). "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996); *see also Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 668 (1989) (separate opinion of Kennedy, J.) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law."), *abrogated on other grounds by Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014); *Randall v. Sorrell*, 548 U.S. 230, 243 (2006) (opinion of Breyer, J.) (*stare decisis* "commands judicial respect for a court's earlier decisions and the rules of law they embody").

The "residual clause" defines the terms "violent felony" and "crime of violence" identically as an offense that "otherwise involves conduct that

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[3] *See also, e.g.*, Appellee's Supplemental Brief at 3-4, United States v. Madrid, 805 F.3d 1204 (10th Cir. 2015) (No. 14-2159); Brief of Plaintiff-Appellee at 9-12, United States v. Gillespie, No. 15-1686 (7th Cir. Sept. 14, 2015); Rule 28(j) Letter Filed Sept. 28, 2015, United States v. Townsend, __ Fed. Appx. __, 2015 WL 9311394 (3d Cir. Dec. 23, 2015) (No. 14-3652); Supplemental Letter Brief for United States at 1-4, United States v. Lee, No. 13-10517 (9th Cir. Aug. 17, 2015); Supplemental Brief for United States at 4-7, United States v. Grayer, No. 14-6294 (6th Cir. Aug. 20, 2015).

presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii); U.S.S.G. § 4B1.2(a)(2). *Johnson* held that this language—"otherwise involves conduct that presents a serious risk of physical injury to another"—was "hopelessly indeterminate" and "vague in all its applications." 135 S. Ct. at 2561. In so doing, the Court overruled *James v. United States*, 550 U.S. 192, 210 n.6 (2007), and *Sykes v. United States*, 131 S. Ct. 2267, 2276-77 (2011), which had rejected arguments that the residual clause was unconstitutionally vague.

Because the petitioner in *Johnson* was sentenced under the ACCA, the Court necessarily resolved the constitutionality of the residual clause in the ACCA context. But it would be incorrect to assume that the context in which *Johnson* was decided narrows the scope of the Court's vagueness holding. The Court identified "[t]wo features of the residual clause" that made the provision "unconstitutionally vague." *Johnson*, 135 S. Ct. at 2557 First, "the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime." *Id.* Second, "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558.

These invalidating features are equally present in the identically-worded residual clause in the Guidelines. Significantly, the Court's reasoning included analysis of the same grave uncertainties presented by the Guidelines' residual clause. The Court relied on four lower court decisions

interpreting the identical language in § 4B1.2(a)(2)[4] to demonstrate that it "has proved nearly impossible" for the lower courts to "mak[e] sense of the residual clause." *Id.* at 2559-60. The "most telling feature" of these decisions, the Court found, was "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider." *Id.* at 2560.[5] Thus, *Johnson* itself demonstrates that its holding, and the pivotal law and logic on which it rests, applies to the residual clause at § 4B1.2(a)(2), rendering it precisely the kind of "shapeless" enhancement provision prohibited by due process.

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[4] *See* 135 S. Ct. at 2560 (analyzing *United States v. Carthorne*, 726 F.3d 503 (4th Cir. 2013), *United States v. Whitson*, 597 F.3d 1218 (11th Cir. 2010), *United States v. McDonald*, 592 F.3d 808 (7th Cir. 2010), and *United States v. Williams*, 559 F.3d 1143 (10th Cir. 2009)).

[5] The Court also granted certiorari, vacated the judgment, and remanded for further consideration in light of *Johnson* fourteen lower court decisions in which defendants had been sentenced under the Guidelines, including five cases on collateral review. *See Caldwell v. United States*, 136 S. Ct. 417 (2015) (direct review); *Banks v. United States*, 136 S. Ct. 365 (2015) (same); *McCarthren v. United States*, 136 S. Ct. 332 (2015) (same); *Gonzales v. United States*, 136 S. Ct. 84 (2015) (same); *Cooper v. United States*, 135 S. Ct. 2938 (2015) (same); *Maldonado v. United States*, 135 S. Ct. 2929 (2015); *Smith v. United States*, 135 S. Ct. 2930 (2015) (same); *Vinales v. United States*, 135 S. Ct. 2928 (2015) (same); *Talmore v. United States*, 135 S. Ct. 2937 (2015) (same); *Beckles v. United States*, 135 S. Ct. 2928 (2015) (collateral review); *Denson v. United States*, 135 S. Ct. 2931 (2015) (same); *Jones v. United States*, 135 S. Ct. 2944 (2015) (same); *Jones v. United States*, 136 S. Ct. 333 (2015) (same); *Wynn v. United States*, 135 S. Ct. 2945 (2015) (same).

That *Johnson*'s holding applies to the Guidelines reflects the evolution and application of this Court's residual clause jurisprudence. While the Court's residual clause cases all have involved the ACCA, those decisions have consistently served as the controlling precedent for both ACCA and Guideline cases in the lower courts. *See, e.g., United States v. Boose*, 739 F.3d 1185, 1187 n.1 (8th Cir. 2014) ("[W]e construe 'violent felony' under [the ACCA] and 'crime of violence' under the Guidelines as interchangeable."); *United States v. Womack*, 610 F.3d 427, 433 (7th Cir. 2010) ("We interpret coterminously the ACCA and the career offender § 4B1.1 provision."); *United States v. Houston*, 187 F.3d 593, 594-95 (6th Cir. 1999) ("[I]t would be logically inconsistent" for a crime to qualify as a "crime of violence" and not as a "violent felony."); *United States v. Jarmon*, 596 F.3d 228, 231 n.* (4th Cir. 2010) ("[P]recedents evaluating the ACCA apply with equal force to U.S.S.G. § 4B1.2."); *Royce v. Hahn*, 151 F.3d 116, 120 (3d Cir. 1998) ("crime of violence" and "violent felony" "should be read consistently with each other"); *United States v. Hill*, 131 F.3d 1056, 1062 n.6 (D.C. Cir. 1997) ("violent felony" cases are "controlling" when interpreting "crime of violence").

Reliance on ACCA cases for the rule of decision in Guidelines cases is well-established in this very context. When this Court rejected suggestions that the residual clause in the ACCA was unconstitutionally vague in *James* and *Sykes*, the lower courts construed those decisions as binding authority necessarily foreclosing any vagueness challenge to the Guidelines' residual clause. As the Second Circuit explained, this Court's residual clause

decisions, albeit announced in the ACCA context, "implicitly repudiated" any argument that the Guidelines' residual clause was void for vagueness. *United States v. Van Mead*, 773 F.3d 429, 438 n.7 (2d Cir. 2014); *see also, e.g.*, *United States v. Spencer*, 724 F.3d 1133, 1137-78 (9th Cir. 2013) (claim that § 4B1.2(a)'s residual clause is unconstitutionally vague "foreclosed by Supreme Court precedent [in *James* and *Sykes*]"); *United States v. Mobley*, 687 F.3d 625, 632 n.7 (4th Cir. 2012) (vagueness challenge to Guidelines' residual clause must be rejected because "the Supreme Court has already determined that the residual clause constitutes an intelligible principle [that] provides guidance that allows a person to conform his or her conduct to the law.") (internal quotations omitted).

Developments since *Johnson* confirm that its holding applies to the Guidelines. The lower courts have held that *Johnson* renders the Guidelines' residual clause unconstitutionally vague. "If one iteration of the clause is unconstitutionally vague, so too is the other," the Tenth Circuit has explained, making clear that "[g]iven our reliance on the ACCA for guidance in interpreting § 4B1.2, it stretches credulity to say that we could apply the residual clause of the Guidelines in a way that is constitutional, when courts cannot do so in the context of the ACCA." *United States v. Madrid*, 805 F.3d 1204, 1211 (10th Cir. 2015); *see also United States v. Townsend*, __ Fed. Appx. __, 2015 WL 9311394, at *4 (3d Cir. Dec. 23, 2015); *United States v. Darden*, 605 Fed. Appx. 545, 546 (6th Cir. July 6,

2015).[6] The Seventh and Eighth Circuits, the only two that previously held that the Guidelines were not subject to vagueness challenge, are poised to reject those holdings, and have assumed in the meantime that those decisions are no longer good law after *Johnson*.[7] Only the Eleventh Circuit has held

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[6] The First, Second, Fifth, and Ninth Circuits have applied *Johnson* to the Guidelines' residual clause based on the government's concession that it is unconstitutionally vague, and remanded for resentencing absent the unconstitutional residual clause. *See, e.g., United States v. Soto-Rivera*, __ F.3d __, 2016 WL 279364, at *5 (1st Cir. Jan. 22, 2016); *United States v. Maldonado*, __ Fed. Appx. __, 2016 WL 229833, at *3 (2d Cir. Jan. 20, 2016); *United States v. Estrada*, No. 15-40264, order at 1 (5th Cir. Oct. 27, 2015); *United States v. Benavides*, 617 Fed. Appx. 790, 2015 WL 5574264, at **1 (9th Cir. Sep. 23, 2015). The Fourth Circuit has assumed that *Johnson* invalidates the Guidelines residual clause, and that prior convictions that depend on the clause no longer qualify as crimes of violence. *United States v. Tucker*, __ Fed. Appx. __, 2016 WL 212502, at *1 (4th Cir. Jan. 19, 2016) (affirming because even without the prior offense upon which the sentencing court relied, the defendant had been convicted of a drug offense that qualified as a crime of violence).

[7] The Eighth Circuit explained that its "reasoning in *Wivell* that the Guidelines cannot be unconstitutionally vague is doubtful after *Johnson*," but left for the district court to decide in the first instance on remand whether the Guidelines' residual clause is unconstitutional. *United States v. Taylor*, 803 F.3d 931, 932 (8th Cir. 2015) (citing *Wivell v. United States*, 893 F.2d 156, 159 (8th Cir. 1990)). The Seventh Circuit has assumed "that the Supreme Court's reasoning [in *Johnson*] applies to section 4B1.2." *Ramirez v. United States*, 799 F.3d 845, 856 (7th Cir. 2015). It heard oral argument on December 2, 2015 in three cases in which the parties agree that *United States v. Tichenor*, 683 F.3d 358 (7th Cir. 2012), which held that the Guidelines cannot be unconstitutionally vague, is no longer good law in light of *Johnson*. *United States v. Gillespie*, No. 15-1686 (7th Cir. argued Dec. 2, 2015); *United States v. Hurlburt*, No. 14-3611 (7th Cir. argued Dec. 2, 2015); *United States v. Rollins*, No. 13-

otherwise, and directed district courts to "still adhere" to decisions overruled by this Court in *Johnson*, *see United States v. Matchett*, 802 F.3d. 1185, 1195-96 (11th Cir. 2015), notwithstanding that those decisions "have proved to be anything but evenhanded, predictable, or consistent," *Johnson*, 135 S. Ct. at 2563, and "do[] not comport with the Constitution's guarantee of due process," *id.* at 2560.

The conclusion that *Johnson*'s holding applies to the Guidelines is compelled by *Johnson* itself, and is reinforced by longstanding residual clause jurisprudence in this Court and the lower courts. The overwhelming consensus is that *Johnson*'s holding *does* apply to the Guidelines.

II. The Court Should In No Way Endorse The Government's Novel Contention That *Johnson* Is Not Retroactive In Guidelines Cases.

Amici agree with the petitioner and the government that *Johnson* announced a substantive rule that therefore applies retroactively to cases on collateral review. The government, however, suggests a different result for those sentenced under

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1731 (7th Cir. argued Dec. 2, 2015). The government argues in these cases that "the identical language [in § 4B1.2] is unconstitutionally vague under *Johnson*," that *Johnson* "rejected" *Tichenor's* view that sentencing provisions are not subject to vagueness challenges, and that *Peugh v. United States*, 133 S. Ct. 2072 (2013) "repudiated" its view that the advisory Guidelines do not have legal force. Brief of Plaintiff-Appellee at 9, 13-14, United States v. Gillespie, No. 15-1686 (7th Cir. Sept. 14, 2015).

the identical clause of the Career Offender Guideline. The government states that "*Johnson* is not entitled to retroactive effect" in Guidelines cases, and asserts that this is so because "the Guidelines are part of the process for imposing sentence, rather than a set of substantive rules that alter the statutory boundaries." U.S. Br. 38 n.9.

The government's claim squarely conflicts with circuit precedent and its own position that this Court's ACCA-narrowing decisions are retroactive in ACCA cases and Guidelines cases alike, and would produce highly anomalous results. Moreover, the definitions of "procedural" and "substantive" rules the government suggests are legally unsound and unnecessary to the decision in this case. *Amici* therefore respectfully request that the Court not endorse the government's novel position or definitions in any way. The Court should decide this case under the well-settled understanding of retroactivity and in a manner that does not suggest a different result in the Guidelines context.

A. The Government's Claim That *Johnson* Is Not Retroactive In Guidelines Cases Squarely Conflicts With Circuit Precedent And The Government's Position Regarding ACCA-Narrowing Decisions.

That the rule announced in *Johnson* could be retroactive in ACCA cases but "not entitled to retroactive effect" in Guidelines cases, U.S. Br. 28 n.9, is unsupported. Courts of appeals that have decided the issue have consistently held that new rules narrowing the ACCA's residual clause apply

retroactively in Guidelines cases. *See United States v. Doe*, 810 F.3d 132, 154 & n.13 (3d Cir. 2015) (holding that *Begay v. United States*, 553 U.S. 137 (2008), applies retroactively in Guidelines cases); *Narvaez v. United States*, 674 F.3d 621, 625-26 (7th Cir. 2011) (holding that because *Begay* and *Chambers v. United States*, 555 U.S. 122 (2009) announced substantive rules, those rules apply retroactively in Guidelines cases); *Brown v. Caraway*, 719 F.3d 583, 594–95 (7th Cir. 2013) (same); *Reina-Rodriguez v. United States*, 655 F.3d 1182, 1189 (9th Cir. 2011) (holding that because its decision limiting the definition of burglary under the ACCA was substantive, it applies retroactively in Guidelines cases); *Rozier v. United States*, 701 F.3d 681 (11th Cir. 2012) ("The government concedes, and we take it as a given, that the Supreme Court's" decision interpreting the ACCA's elements clause "is retroactively applicable" in Guidelines cases.).

As the Third Circuit aptly put it, "Under *Teague*, either a rule is retroactive or it is not." *Doe*, 810 F.3d at 154 n.13. The government has argued just that in cases across the country. As stated by the Appellate Section of the Department of Justice, this Court's decision in *Begay* "applies retroactively to ACCA cases, mandatory guidelines cases, and advisory guideline cases alike." Supplemental Brief for United States on Rehearing En Banc at 48, Spencer v. United States, 773 F.3d 1132 (11th Cir. 2014) (en banc) (No. 10-10676). The government emphasized that "*Begay*'s status as a substantive rule is fixed," and "does not fluctuate based on whether the prisoner is challenging an ACCA enhancement, a mandatory guidelines enhancement, or, as here, an advisory guidelines enhancement." *Id.* at 15. The

government was "not aware of any such chameleon-like rules" that "were substantive for some purposes and procedural for others." *Id.* at 15. Rather, "a rule either is or is not substantive." *Id.* Moreover, *Begay* "narrows eligibility for the advisory career-offender enhancement just as much as it narrowed eligibility for the [ACCA] enhancements," and "as in [ACCA] cases, no procedures can be afforded to render that enhancement applicable." *Id.* at 55.

Surprisingly, the government has now taken the exact opposite position with respect to the rule announced in *Johnson*, suggesting that it can vary from a substantive rule to a procedural rule depending on the context in which it is invoked. But there is nothing in the holding of *Johnson* or in this Court's retroactivity decisions to support the government's novel contention that *Johnson* is a "chameleon-like" rule. A rule is either retroactive or it is not.

Addressing the fact that the lower courts have applied *Begay* and *Chambers* retroactively in ACCA cases, the government argues here that "it would be highly anomalous if this Court's statutory-construction decisions narrowing the residual clause received retroactive effect, but the holding of *Johnson* invalidating that clause entirely did not." U.S. Br. 15. The lower courts have also applied these same ACCA-narrowing decisions retroactively to Guidelines cases. It would be just as anomalous if these decisions were applied retroactively in Guidelines cases, but *Johnson*'s holding, entirely invalidating the clause on constitutional grounds, was not.

Accordingly, the Court should decline the government's invitation to hold in this case that *Johnson* is a substantive rule "in ACCA cases," U.S. Br. 40, and it should otherwise avoid suggesting that the issue resolved here would be decided differently in Guidelines cases.

B. The Definitions Of Substantive And Procedural Rules The Government Suggests Are Unsound And Unnecessary To The Decision In This Case.

The Court should also refrain from endorsing the definitions of "procedural" and "substantive" the government suggests in support of its contention that *Johnson* is not retroactive in Guidelines cases, *i.e.*, "the Guidelines are part of the process for imposing sentence, rather than a set of substantive rules that alter the statutory boundaries." U.S. Br. 38 n.9. These definitions are legally unsound and unnecessary to the decision in this case.

The *Teague* bar potentially applies only to "new constitutional rules of criminal procedure." *Teague v. Lane*, 489 U.S. 288, 310 (1989). Substantive rules are not subject to the *Teague* bar, *Schriro v. Summerlin*, 542 U.S. 348, 352 n.4 (2004), and "have retroactive effect regardless of when a conviction became final," *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016). No one disputes that a "rule of criminal procedure" regulates "*only the manner of determining* the defendant's culpability," *Summerlin*, 542 U.S. at 353, or that the rule announced in *Johnson* in no way fits that description. *See* U.S. Br. 28 (arguing that *Johnson* is not a

procedural rule because it did not impose a higher burden of proof, alter the admissible evidence, or change the factfinder, but rather struck the residual clause entirely); Pet. Br. 21-22 (similar).

The government, however, indicates that *Johnson* is transformed into a "rule of criminal procedure" in Guidelines cases because "the Guidelines are part of the process of imposing sentences." U.S. Br. 28 n.9. But if that were the definition of a "rule of criminal procedure," *Johnson* would be such a rule in both ACCA cases and Guidelines cases.[8] The rule announced in *Johnson*—that the language "otherwise involves conduct that presents a serious risk of physical injury to another" is unconstitutionally vague—says nothing about the "process of imposing sentences." The Court has never defined a "rule of criminal procedure" in the manner the government suggests, and should not do so now.

Nor has the Court ever limited substantive rules to those that "alter statutory boundaries." Rather, the Court has said that substantive rules "include" rules that "narrow the scope of a criminal statute by interpreting its terms," *Summerlin*, 542

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[8] Statutes, too, are a "part of the process of imposing sentences." And contrary to the government's assertion that the Guidelines themselves are not "substantive rules," U.S. Br. 38 n.9, an *ex post facto* increase in the applicable guideline range "alter[s] the substantive formula used to calculate the applicable sentencing range." *Peugh v. United States*, 133 S. Ct. 2072, 2088 (2013).

U.S. at 351-52 (citing *Bousley v. United States*, 523 U.S. 614, 620-21 (1998)), that "alter[] the range of conduct or the class of persons that the law punishes," *Summerlin*, 542 U.S. at 353 (citing *Saffle v. Parks*, 494 U.S. 484, 495 (1990)), or that "prohibit a certain category of punishment for a class of defendants because of their status or offense," *Saffle*, 494 U.S. at 494; *see also Montgomery*, 136 S. Ct. at 732. As the courts of appeals have found, *Johnson* fits comfortably within any of those formulations,[9] and the Court should not retreat from them now.

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[9] *See In re Rivero*, 797 F.3d 986, 989 (11th Cir. 2015) ("'The new rule announced in *Johnson* is substantive rather than procedural because it narrowed the scope of section 924(e) by interpreting its terms,'" and "'narrowed the class of people who are eligible for' an increased sentence under the [ACCA].") (internal citations and brackets omitted); *In re Watkins*, __ F.3d __, 2015 WL 9241176, at *6 (6th Cir. Dec. 17, 2015) ("*Johnson* prohibits the imposition of an increased sentence on those defendants whose *status* as armed career criminals is dependent on offenses that fall within the residual clause.") (emphasis in original); *Price v. United States*, 795 F.3d 731, 734 (7th Cir. 2015) ("*Johnson*, we conclude, announced a new substantive rule. In deciding that the residual clause is unconstitutionally vague, the Supreme Court prohibited 'a certain category of punishment for a class of defendants because of their status.'") (internal citations omitted); *cf. Narvaez*, 674 F.3d at 626 ("*Chambers*, like *Begay*, falls within the class of decisions that 'prohibit[] a certain category of punishment for a class of defendants because of their status or offense.'") (internal citation omitted); *Reina-Rodriguez*, 655 F.3d at 1189 ("*Grisel* announced a substantive rule [by] alter[ing] the conduct that substantively qualifies as burglary").

Finally, the government suggests that *Teague*, which arose in the state-prisoner context, applies to federal § 2255 proceedings. U.S. Br. 21 n.5. This Court has repeatedly reserved judgment on that issue, *see Chaidez v. United States*, 133 S. Ct. 1103, 1113 n.16 (2013); *Danforth v. Minnesota*, 552 U.S. 264, 269 n.4 (2008), and there are reasons why *Teague* may not apply, at least not with full force, to § 2255 proceedings, *see, e.g.*, Brief Amici Curiae of Habeas Scholars and Constitutional Accountability Center in Support of Petitioner at 5-8, Chaidez v. United States, 133 S. Ct. 1103 (2013) (No. 11-820). That issue was not presented below or sufficiently briefed here; this Court should do no more than assume, without deciding, that *Teague* applies in this case. *See Chaidez*, 133 S. Ct. at 1113 n.16.

III. The Court Should Resolve *Johnson*'s Retroactivity In Guidelines Cases This Term.

The Court should resolve the issue of *Johnson*'s retroactivity in the Guidelines context this Term, for many of the same reasons it granted *certiorari* and expedited briefing in this case. The circuits are now staying ACCA and Guidelines cases pending a decision here. But while circuit law has thus far been settled that ACCA decisions apply retroactively to Guidelines cases, the government is advancing its contrary position across the country. Thus, without presuming the result in this case, a decision that *Johnson* is retroactive will not resolve the issue in Guidelines cases.[10] Meanwhile, there is

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[10] While no court of appeals has definitively resolved the issue, the courts are reaching divergent conclusions in *dicta* and in

an ever-shortening one-year statute of limitations, requiring federal prisoners to file any *Johnson*-based § 2255 motions by June 26, 2016—one year from the date *Johnson* was decided. Critically, that deadline remains fixed even if this Court or other courts later hold that *Johnson* applies retroactively in Guidelines cases. *See* 28 U.S.C. § 2255(f)(3); *Dodd v. United States*, 545 U.S. 353, 357 (2005).

Most prisoners who stand to benefit from *Johnson* are serving lengthy career-offender sentences under the Guidelines, and many have already litigated their initial § 2255 motion.[11] Those

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non-precedential orders. The Eleventh Circuit said in *dicta* in *In re Rivero*, 797 F.3d 986 (11th Cir. 2015), a Guidelines case, that if the petitioner were "seeking a first collateral review of his sentence, the new substantive rule from *Johnson* would apply retroactively." *Id.* at 991. The Seventh Circuit held in *Price v. United States*, 795 F.3d 731 (7th Cir. 2015), an ACCA case, that "*Johnson* announces a new substantive rule of constitutional law that the Supreme Court has categorically made retroactive," *id.* at 732, then authorized several second or successive § 2255 motions in Guidelines cases based on *Price*. *See, e.g., Stork v. United States*, No. 15-2687, order at 1 (7th Cir. Aug. 13, 2015); *Best v. United States*, No. 15-2417, order at 1–2 (7th Cir. Aug. 5, 2015); *Swanson v. United States*, No. 15-2776, order at 1 (7th Cir. Sept. 4, 2015); *Zollicoffer v. United States*, No. 15-3125, order at 1 (7th Cir. Oct. 20, 2015); *Spells v. United States*, No. 15-3252, order at 1 (7th Cir. Oct. 22, 2015). The Eighth Circuit, in contrast, denied authorization of a successive motion in a Guidelines case. *See Richardson v. United States*, 623 Fed. Appx. 841, 842 (8th Cir. 2015) (unpublished).

[11] Judging by the ongoing reviews conducted by Federal Defender Offices across the country, a majority of career offenders were qualified as such based on prior drug offenses, rather than by residual-clause offenses. *Accord* U.S. Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving*

prisoners are now in a successive posture, and, if the Court does not resolve *Johnson*'s Guidelines implications this Term, they will not be able to file *Johnson* § 2255 motions before the limitations period expires. That is because they must obtain authorization from the court of appeals to file a successive § 2255 motion. *See* 28 U.S.C. § 2255(h)(2); *Tyler v. Cain*, 533 U.S. 656 (2001).

As noted, courts of appeals have deferred ruling on ACCA and guidelines cases pending a decision in this case, but may later decide (incorrectly in the view of *amici*) that a ruling in petitioner's favor in this case does not decide the retroactivity issue in guidelines cases. Denials of authorization cannot be appealed to this Court. *See* 28 U.S.C. § 2244(b)(3)(E). Therefore, without a ruling on retroactivity in the Guidelines context this Term, any eventual authorization from the court of appeals to file a successive § 2255 motion would be meaningless because the statute of limitations will have expired. That would leave many thousands of *Johnson* claimants with no recourse except an original habeas petition filed in this Court.[12]

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the Goals of Sentencing Reform 133 (2004) ("Most of these offenders were subject to the guideline because of the inclusion of drug trafficking crimes in the criteria qualifying offenders for the guidelines.").

[12] Prisoners who have not yet had their initial § 2255 motion adjudicated, of course, may file or amend such motions to seek relief under *Johnson* before the limitations period expires. While the Fifth Circuit has held *Johnson* non-retroactive even in the ACCA context, prisoners with initial § 2255 motions there may at least file and petition this Court for *certiorari*—an avenue unavailable to prisoners in a successive posture. *See In*

That scenario is not only plausible, it is probable. Nearly every court—and even the government—agree that *Johnson* is retroactive in the ACCA context.[13] But again, even if this Court were to confirm that consensus, such a holding is unlikely to definitively resolve the retroactivity question in Guidelines cases. The inevitable flood of original habeas petitions in this Court may be averted only if the Court comprehensively resolves *Johnson*'s retroactivity this Term.[14]

Importantly, *Johnson*'s retroactivity should not develop on a piecemeal basis. If the Court holds

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re Williams, 806 F.3d 322, 324-26 (5th Cir. 2015); 28 U.S.C. § 2244(b)(3)(E).

[13] *See Watkins*, 2015 WL 9241176, at *5-6; *Price v. United States*, 795 F.3d 731, 733-34 (7th Cir. 2015); *Richardson v. United States*, 623 Fed. Appx. 841, 842 (8th Cir. 2015); *see also Pakala v. United States*, 804 F.3d 139, 140 (1st Cir. 2015) (*prima facie* showing that *Johnson* retroactive); *Woods v. United States*, 805 F.3d 1152, 1154 (8th Cir. 2015) (same).

[14] Conceivably, the problem could be avoided short of a merits determination this Term if the Court were to accept a case this Term for argument and decision next Term, while at the same time instructing the courts of appeals to hold prisoners' applications to file a successive § 2255 motion pending decision in the accepted case. Amici urge this approach if the Court is not inclined to decide the issue on the merits this Term. This would at least allow petitioners to file protective § 2255 petitions in the district court within the one-year statute of limitations, while urging district courts to hold the petitions in abeyance pending the decisions of the court of appeals on the applications to file successive petitions.

Johnson retroactively applicable in the ACCA context and takes no further action, the lower courts will be confronted with the government's argument that *Johnson* is not retroactive as applied to the Guidelines. Those courts may very well reach divergent conclusions, and the question would almost surely make its way to this Court—but not for another year or two. In the meantime, litigation would persist, additional unforeseen issues would arise, and thousands of federal prisoners would be left in legal limbo.

Finally, the stakes are high. If those sentenced under the Guidelines' residual clause are eligible to seek *Johnson* relief, many would be entitled to immediate release and should not be forced to serve additional time waiting for their claims to be considered on the merits. In the meantime, some courts likely will grant relief, only to have to undo those decisions—including recalling prisoners back into custody—if the Court were to ultimately reverse them. Resolving the retroactivity issue now would avert that predictable morass and spare lower courts the burdens of continued first-round litigation.

Amici are aware of two cases that raise the issue of *Johnson*'s retroactivity in the Guidelines context. *Rivero* is a pending original habeas matter in which the Court has ordered a response from the United States (due March 2, 2016). *In re Rivero*, No. 15-7776 (S. Ct. filed Jan. 14, 2016). *Jones* is a forthcoming petition for *certiorari* from the Third Circuit's denial of a certificate of appealability. *United States v. Alfrederick Jones*, No. 14-2882 (3d Cir. reh'g denied Jan. 22, 2016). *Amici* respectfully

urge the Court to accept both cases and decide this important issue this Term.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below and hold that *Johnson* applies retroactively.

Respectfully submitted,

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IN THE
Supreme Court of the United States

GREGORY WELCH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF INDIANA, ARKANSAS, MAINE, MICHIGAN, MONTANA, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, UTAH, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF THE COURT-APPOINTED *AMICUS CURIAE*

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QUESTIONS PRESENTED

1. Whether the district court erred when it denied relief on petitioner's Section 2255 motion to vacate, which alleged that his prior conviction for robbery under Fla. Stat. Ann. § 812.13(1) did not qualify as a violent felony under the Armed Career Criminal Act of 1984 ("ACCA").

2. Whether *Johnson v. United States*, 135 S. Ct. 2551 (2015)—which held that the residual clause of ACCA, 18 U.S.C. § 924(e)(2)(B)(ii), is void for vagueness based on principles of procedural due process—nonetheless announced a new "substantive" rule of constitutional law that is retroactively applicable on collateral review under *Teague v. Lane*, 489 U.S. 288 (1989).

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INTEREST OF THE *AMICI* STATES

Federal habeas review of State criminal convictions intrudes on State sovereignty. When it grants habeas relief, a "federal court interferes with the execution of a state-imposed sentence and thus with the State's ability to enforce its courts' judgments, independently adjudicate constitutional questions, ensure the finality of its convictions and sentences, and administer its criminal and penal laws." J. Richard Broughton, *Habeas Corpus and the Safeguards of Federalism*, 2 Geo. J.L. & Pub. Pol'y 109, 113–14 (2004). "[T]he attendant burden that is placed upon a state's administration of justice, and upon the federal system, is quite real." *Id.* at 114. This is particularly true when the federal writ is predicated on a new rule of federal constitutional law that was never available to the state courts that adjudicated the case.

Over a quarter-century ago, the Court acted to limit the scope of that burden. In *Teague v. Lane*, 489 U.S. 288, 310–11 (1989) (plurality opinion), the Court held that new rules announced by the Supreme Court would not apply on habeas corpus if the rule was announced after the case became final on direct review, except for substantive rules of constitutional law and for watershed rules of criminal procedure. It recognized that "[t]he costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus generally far outweigh the benefits of this application." *Id.* at 310 (quotation omitted). Retroactivity "*continually* forces the States to

marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Id.* As a result, "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands." *Id.* (quotation omitted).

Especially in light of *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016), *as revised* (Jan. 27, 2016), in which the Court held that States must provide at least as much retroactivity as the federal courts do, States have a strong interest in protecting a robust *Teague* retroactivity standard, and in thereby protecting the finality of criminal convictions and preserving existing limitations on the availability of collateral review and relief. The *Amici* States urge the Court to reaffirm that a constitutional holding is retroactive only when it "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or when it articulates a new "watershed rule[] of criminal procedure[.]" *Teague*, 489 U.S. at 311 (quotations omitted).

SUMMARY OF THE ARGUMENT

The decision below should be affirmed for three reasons:

First, hundreds of state penal statutes contain similar language to the residual clause and may now be vulnerable to invalidation under *Johnson v. United States*, 135 S. Ct. 2551 (2015). If *Johnson* is retroactive, any state statute invalidations based upon *Johnson* may also be retroactive, thus permitting any defendants convicted under those state statutes to seek collateral review of their previously-final convictions.

Second, Petitioner takes the novel position that *any* Supreme Court decision holding "a law unconstitutional" must be "a substantive rule that applies retroactively on collateral review" because the invalidated law "is void, and is as no law[.]" Pet. Br. at 1, 13 (quotation omitted). Essentially, he asks this Court to overrule *Teague* and upset the carefully crafted balance that protects State sovereignty and interests in finality and comity. In its place, he advocates a return to pre-*Teague* general retroactivity. *Id.* at 36. And under the Court's recent decision in *Montgomery*, 136 S. Ct. at 729, States would be required to incorporate that general retroactivity into their own post-conviction relief systems. The result would likely be a vast increase in the number of state-level post-conviction petitions, further taxing States' already limited resources.

Third, that new burden on the States would not materially advance any significant liberty interest. The preference for finality of criminal adjudications is outweighed when a new rule places certain defendants or conduct "beyond the State's power to punish," *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004), but vagueness cases do not extend so far. Rather, vagueness cases are about deficient statutory language regarding conduct that legislatures are free to proscribe. When a defendant is indisputably guilty of engaging in conduct that is not constitutionally protected, the defendant's interest in fair notice does not outweigh the State's interest in the finality of—and federal respect for—the conviction.

ARGUMENT

I. Many State Statutes May Be Vulnerable Under *Johnson*, So Retroactivity May Cause Numerous Final Cases to Be Revisited

Making *Johnson* retroactive would place potentially thousands of previously final state convictions and sentences in new and unjustified jeopardy. *Johnson* rendered hundreds of textually similar state penal statutes newly susceptible to invalidation, and when the Court makes a new constitutional rule retroactive, that rule becomes a permissible basis for a state post-conviction relief petition—even if a defendant has already filed unsuccessful petitions. So, if *Johnson* applies retroactively, *any* prisoner convicted under a comparable statute could collaterally attack that

conviction, even if it has already survived direct review and is now final.

In some situations, such as where specific actions once deemed criminal are now constitutionally protected, such outcomes may be justified. But where, as here, the underlying rationale for statutory invalidity is procedural rather than substantive, the Constitution surely does not demand that States bear this heavy burden.

The problematic textual formulation of the ACCA invalidated in *Johnson* was a portion of the definition of "violent felony" known as the "residual clause": any felony that "otherwise involves conduct that presents a *serious potential risk* of physical injury to another." *Johnson*, 135 S. Ct. at 2555–56 (quoting 18 U.S.C. § 924(e)(2)(B)) (emphasis added). Such statutory text is hardly unique; legislatures frequently use similar words to cast a wide net over hard-to-define criminal behavior.

The brief of the Court-appointed *amicus curiae* discusses several federal statutes that incorporate general liability standards akin to that invalidated in *Johnson*. *See* Br. of Amicus Curiae at 53–55. In addition, hundreds of state penal statutes "hinge criminal liability or sentencing consequences on a 'risk,' 'substantial risk,' 'grave risk,' or 'unreasonable risk' of physical injury to other people." Supp. Br. for the United States at 22–23, *Johnson*, 135 S. Ct. 2551 (collecting statutes).

In light of the Court's holding in *Johnson*, many of these statutes may now be at risk of invalidation. Again, the language at issue in *Johnson* was the definition of "violent felony" as "any crime that otherwise involves conduct that presents a *serious potential risk* of physical injury to another." *Johnson*, 135 S. Ct. at 2555–56 (quoting 18 U.S.C. § 924(e)(2)(B)) (emphasis added). But even though the Court acknowledged some crimes clearly fell within that description, it found the language unconstitutionally vague because courts did not apply it consistently. *Id.* at 2559–60.

That conclusion represents a significant change in the Court's void-for-vagueness doctrine. Before *Johnson*, it was settled that a statute was void for vagueness only if it was vague in *all* applications. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494–95 (1982). But *Johnson* rejected "the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp[,]" concluding instead that the residual clause was unconstitutionally vague because judges had trouble agreeing on how to determine whether conduct posed a "serious potential risk" of harm. *Johnson*, 135 S. Ct. at 2561.

Accordingly, under *Johnson*, a defendant challenging a penal statute as unconstitutionally vague need not show that it is vague as applied to his particular case, or that there is no set of circumstances in which the statute is clear. Rather, such a defendant need only demonstrate that close

cases have arisen in the past, or that judicial decisions applying it demonstrate a "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider." *Id.* at 2560.

Given this new approach, if "substantial risk of serious physical injury" is unconstitutionally vague in the ACCA, similar language in other statutes could also be problematic. For example, Alabama law defines the crime of "reckless endangerment" as reckless conduct that "creates a *substantial risk* of serious physical injury[.]" Ala. Code § 13A-6-24(a) (emphasis added). Nevada law defines "crime of violence" in part as "[a]ny felony for which there is a *substantial risk* that force or violence may be used against the person or property of another in the commission of the felony." Nev. Rev. Stat. Ann. § 200.408.2(b)(2). In Indiana, resisting law enforcement, normally a class A misdemeanor, becomes a "Level 6 felony if while committing [the offense], the person draws or uses a deadly weapon, inflicts bodily injury on or otherwise causes bodily injury to another person, or operates a vehicle in a manner that creates a *substantial risk* of bodily injury to another person[.]" Ind. Code § 35-44.1-3-1(b) (emphasis added). If "serious potential risk" is vague, it is at least plausible that terms such as "substantial risk" could be vague as well, depending on the track record of enforcement.

To be sure, the majority in *Johnson* rejected the notion "that to hold the residual clause unconstitutional is to place [similarly worded]

provisions in constitutional doubt[,]" observing that most of the statutes the United States cited in its brief required courts to judge the riskiness of the defendant's actual conduct rather than of "an idealized ordinary case of the crime." *Johnson*, 135 S. Ct. at 2561. And, of course, the Court can expect States to offer robust defenses of their statutes against vagueness challenges predicated on *Johnson*.

But given *Johnson*'s plain alteration of the vagueness standard in favor of those challenging criminal statutes, States at this point take little comfort in the Court's disclaimer. Indeed, already, in *John Does 1–5 v. Cooper*, No. 1:13CV711, 2015 WL 8179498, at *10 (M.D.N.C. Dec. 7, 2015), the court invalidated a state statute prohibiting certain sex offenders from being present "[a]t any place where minors gather for regularly scheduled educational, recreational, or social programs." The phrases "regularly scheduled" and "where minors gather" were a problem because they encompassed "too wide a range of situations which would cause men of common intelligence [to] necessarily guess at [the statute's] meaning, or allow an essentially standardless sweep by law enforcement," *id.* at *12 (alterations in original) (quotations and citations omitted), even though "some places could clearly be identified as being restricted." *Id.* (citing *Johnson*, 135 S. Ct. at 2560–61).

In short, statutes that once seemed acceptably broad may now be vulnerable to constitutional attack under *Johnson*. What is more, under the *Johnson* standard, any such vaguely worded statutes

may be invalidated at the behest of criminal defendants whose conduct could plainly have been invalidated by a more precisely drawn statute. It is one thing for broadly worded statutes to be removed from a prosecutor's arsenal going forward. It is another to require re-examination of the convictions and sentences of everyone ever convicted under those statutes, thereby permitting the jailhouse doors to swing open prematurely for offenders whose underlying bad conduct remains validly subject to criminal sanction, even if the statute of conviction contains what amounts to a procedural flaw.

II. Petitioner's Implicit Repudiation of *Teague* Would Affect State As Well As Federal Post-Conviction Relief Systems

Petitioner's cavalier treatment of *Teague* fails to account for both its historical antecedents and its role in protecting finality and comity. As a result, Petitioner's retroactivity theory would reduce the power of *Teague* to protect the finality of state convictions and sentences, which would have an impact for both state and federal collateral attacks.

A. Before *Teague*, courts determined retroactivity under a flexible balancing test articulated in *Linkletter v. Walker*, 381 U.S. 618, 629 (1965). The *Linkletter* test required courts to consider "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Id.* Courts then had discretion "to give retroactive effect to some new rules in some

cases but not others." *Retroactive Application of New Rules*, 122 Harv. L. Rev. 425, 434 (2008).

But "the purpose of federal habeas corpus is to ensure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine." *Sawyer v. Smith*, 497 U.S. 227, 234 (1990). Under *Linkletter*, retroactivity was so pervasive that federal habeas review frequently squandered state judicial resources. *See* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chic. L. Rev. 142, 148 (1970). "State judges and attorneys general, Federal judges, and leading commentators" expressed "widespread dissatisfaction with the present system of Federal collateral review on grounds of federalism, proper regard for the independent stature of the State courts, the need for finality in criminal adjudication, and conservation of limited criminal justice resources." S. Rep. No. 98-226, at 6 (1983). Pre-*Teague* federal habeas review "undermine[d] Federal-State comity [and] impinge[d] on the finality of State trials." *Who Is on Trial? Conflicts Between the Federal and State Judicial Systems in Criminal Cases: Hearing Before Subcomm. of the H. Comm. on Gov't Operations*, 100th Cong. 126 (1988) (statement of Andrea Hillyer, Assistant General Counsel to the Governor of Florida).

In *Teague*, the Court adopted the view that new rules generally should not be available on collateral

review. Justice Harlan had long advocated this position, *Teague*, 489 U.S. at 303, and Justice Stevens, in the part of his concurring opinion joined by Justice Blackmun, agreed: "In general, I share Justice Harlan's views about retroactivity [D]efendants seeking collateral review should not benefit from new rules unless those rules free individuals from punishment for conduct that is constitutionally protected or unless the original trial entailed elements of fundamental unfairness." *Id.* at 319 (Stevens, J., concurring in part and concurring in the judgment) (quotations and citation omitted).

Even after *Teague*, many stakeholders urged further reform because "unnecessary delays [and] a seeming lack of finality of State criminal proceedings" tested "the credibility of the criminal justice system[.]" H. Rep. No. 103-470, at 1 (1994). Seven years after *Teague*, Congress enacted AEDPA, which embraced the "principles established by *Teague v. Lane*[.]" *Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearing on S. 623 Before the S. Comm. on the Judiciary*, 104th Cong. 3 (1995) (statement of Sen. Orrin Hatch). AEDPA's "general principle" is that "Federal courts shall not grant a claim that was adjudicated in State Court proceedings." Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 Colum. L. Rev. 888, 946 (1998) (quoting 141 Cong. Rec. S7842 (daily ed. June 7, 1995) (Statement of Sen. Joe Biden)).

AEDPA also curtailed the situations in which a petitioner could file a successive federal habeas

petition. Section 2244 barred a petitioner from raising a claim that had been raised in the initial petition. 28 U.S.C. § 2244(b)(1). It also limited the situations in which a petitioner could raise a new claim. If the new claim was based on a new rule of constitutional law, the petitioner must show that this Court "made [it] retroactive to cases on collateral review" and that it was "previously unavailable" to the petitioner. *Id.* (b)(2)(A); *Tyler v. Cain*, 533 U.S. 656, 662 (2001). In short, AEDPA "commanded a renewed respect for state courts and their judgments, a respect which recognizes their role as 'coequal parts of our national judicial system.'" Scheidegger, *supra*, at 953 (quoting *Sawyer*, 497 U.S. at 241).

Here, however, Petitioner contends that every unconstitutional penal statute is "void ab initio" such that all constitutional adjudications of statutes should have retroactive effect. The result would be substantial vitiation of AEDPA's "clearly established" requirement (and routine clearance of the "made retroactive" requirement for successive habeas petitions). A habeas petitioner cannot obtain relief without showing that the last state court to rule on his case failed to apply (or unreasonably applied) "clearly established" federal law as it existed when the state court ruled. Under Petitioner's view, anytime a statute is invalidated, either the state courts would have to permit a new collateral attack or forgo the protection of "clearly established" because there would be no state court decision that is owed deference. *See* 28 U.S.C. § 2254(b)(1). Petitioner would, in effect, allow

habeas petitioners to hold state courts to post-finality decisions invalidating criminal statutes for any reason.

That may have been the law over a century ago, *Linkletter*, 381 U.S. 618, 622–23 (citing *Norton v. Shelby County*, 118 U.S. 425 (1886)), but for over seventy years, the Court has recognized that "[t]he past cannot always be erased by a new judicial declaration." *Id.* at 625 (quoting *Chicot Cnty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940)).

Petitioner's proposed rule could return a substantial set of state criminal convictions to the pre-*Teague* system of perpetual federal review. The better approach is to scrutinize whether invalidation of a criminal statutes does, in fact, afford a new substantive constitutional protection that, for sake of fundamental fairness, must be applied even to those whose convictions under the same (or a substantially similar) statute are now final.

B. Because many states offer their own procedures for launching collateral attacks on criminal convictions, the impact of abating the rigorous *Teague* standard whenever any statute is declared invalid for any reason would not be limited to collateral review in federal court.

Maintaining strict retroactivity limits under *Teague* is particularly important because, unlike the federal courts under AEDPA, many states permit successive post-conviction collateral attacks on their

convictions and sentences. In other words, while a state prisoner may not file a successive *federal* habeas petition based on a new supposedly substantive constitutional rule without a specific "made retroactive" holding from this Court, *Tyler*, 533 U.S. at 664, no such barrier is in place in many states. In states such as Indiana that have no significant limits on the number of post-conviction relief petitions a prisoner may file, Ind. Post-Conviction Rule 12(b) (permitting the filing of a successive petition upon a showing of "a reasonable possibility" that the petitioner is entitled to relief), the impact of a new and supposedly substantive constitutional rule could be felt right away, even before the Court addresses retroactivity.

Immediate successive-petition impact is particularly significant considering that federal retroactivity doctrine now governs state PCR proceedings. Until recently, that is, States were free to determine for themselves what decisions would be retroactive in their own post-conviction systems. Most states incorporated *Teague*, but some applied different tests. *See, e.g.*, *State v. Smart*, 202 P.3d 1130, 1138–39 (Alaska 2009); *Johnson v. State*, 904 So. 2d 400, 407–09 (Fla. 2005); *State v. Whitfield*, 107 S.W.3d 253, 268 (Mo. 2003); *Colwell v. State*, 59 P.3d 463, 470–71 (Nev. 2002); *Cowell v. Leapley*, 458 N.W.2d 514, 518 (S.D. 1990).

Just this Term, however, the Court held that States *must* apply "*Teague*'s conclusion establishing the retroactivity of new substantive rules[.]" *Montgomery*, 136 S. Ct. at 729 ("The Court now holds

that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.").

Because the Court has mandated that States apply the *Teague* retroactivity standard, if the Court decides to relax that standard, it will expand the availability of collateral review in State courts as well. Such an expansion could permit many offenders whose convictions and sentences had previously been final to file new petitions for state collateral relief, even in circumstances where the Court itself has not "made retroactive" a new constitutional rule for purposes of AEDPA.

III. Federalism and Comity Outweigh the Attenuated Liberty Interests of Prisoners Convicted of Indisputably Criminal Conduct Under Vague Statutes

Petitioner's position threatens fundamental State sovereign interests without advancing genuine liberty interests of defendants whose final convictions and sentences would be jeopardized.

To begin, it is critical to bear in mind that, by limiting retroactive application, "the *Teague* principle protects not only the reasonable judgments of state courts but also the States' interest in finality[.]" *Beard v. Banks*, 542 U.S. 406, 413 (2004). "Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is

essential to the operation of our criminal justice system." *Teague*, 489 U.S. at 309.

In many decisions where a criminal statute is invalidated, retroactivity is justified. For example, "constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish" should be applied retroactively. *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). Examples of penalty-focused substantive rules that are always retroactive include prohibitions on executing persons who are under the age of 16 or who have mental disabilities. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (citing *Thompson v. Oklahoma*, 487 U.S. 815 (1988)), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). *Thompson* has been extended to include persons under 18 who receive a death penalty or mandatory life imprisonment without parole. *Roper v. Simmons*, 543 U.S. 551, 578 (2005); *Miller v. Alabama*, 132 S. Ct. 2455 (2012). Several pre-*Teague* cases cited in Justice Harlan's *Mackey* concurrence are also instructive. For example, cases such as *Street v. New York*, 394 U.S. 576 (1969) (protecting flag burning); *Stanley v. Georgia*, 394 U.S. 557 (1969) (protecting possession of obscene matter); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (protecting use of contraceptives); and *Loving v. Virginia*, 388 U.S. 1 (1967) (protecting interracial marriages) should be applied retroactively. *Mackey v. United States*, 401 U.S. 667, 692 n.7 (1971) (Harlan, J., concurring). Each of those cases placed certain conduct beyond the State's power to punish.

But in the context of void-for-vagueness challenges, the same liberty interests do not arise. In vagueness cases, the problem is not that the statute criminalizes constitutionally protected conduct, but that the statute makes it too difficult to discern precisely *what* constitutes a crime. *Contrast Texas v. Johnson*, 491 U.S. 397, 420 (1989) (reversing conviction for constitutionally protected act of flag burning) *with Connally v. General Constr. Co.*, 269 U.S. 385, 388, 391–92 (1926) (invalidating a statute requiring employers to pay at least "the current rate of per diem wages in the locality") *and United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 86, 91 (1921) (invalidating a prohibition on charging "excessive prices for any necessaries"). Defendants already convicted under the ACCA's residual clause (or analogous statues that may later be deemed unconstitutionally vague) are in prison because they committed acts that legitimately constitute crimes, not because they engaged in constitutionally protected conduct. They do not deserve windfall release simply because those crimes were defined with insufficient specificity.

What is more, the retroactive impact of Johnson would presumably extend to vaguely worded sentence enhancements, the context for *Johnson*. Yet with sentencing enhancements, the implications of vague wording for individual liberty are even more remote. "[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law." *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999). Sentence enhancements, however, presume valid conviction of an illegal act,

meaning that the defendant decided *not* to conform despite "fair notice" of the crime itself. *See 511 Detroit St., Inc. v. Kelley*, 807 F.2d 1293, 1295 (6th Cir. 1986) ("[P]laintiffs do not appear to have a problem determining when their conduct is criminal, but they complain that they cannot determine with sufficient precision just how criminal it is.").

Other amici have argued that the expectation of, and thus the interest in, finality is lesser "with respect to sentences than with respect to convictions." Br. of Scholars of Federal Courts and Sentencing as *Amici Curiae* in Support of Petitioner at 22. Not so; as the *Teague* plurality noted, "[c]ollateral challenges to the sentence delay the enforcement of the judgment at issue and decrease the possibility that 'there will at some point be the certainty that comes with an end to litigation.'" *Teague*, 489 U.S. at 314 n.2 (quoting *Sanders v. United States*, 373 U.S. 1, 25 (1963) (Harlan, J., dissenting)). And the Court has said before that "the finality concerns underlying Justice Harlan's approach to retroactivity are applicable in the capital sentencing context, as are the two exceptions to his general rule of nonretroactivity." *Penry*, 492 U.S. at 314.

Accordingly, while applying *Johnson* retroactively would undermine States' substantial sovereign interests in the finality of criminal convictions and sentences, retroactivity would offer very little actual protection of individual liberty in return. It is hard to imagine a scenario where someone has been jailed for taking action that, while

understood by prosecutors and jurors to create a "serious potential risk of physical injury to another," is now, after *Johnson*, constitutionally protected. And absent the possibility that a substantial number of such cases may arise, there is no basic unfairness in refusing to undo the convictions and sentences of criminals whose underlying conduct was undoubtedly criminal, even though the legal description of the charge crime (or sentence enhancement) was unconstitutionally broad. In this balance, interests of finality and federalism should prevail.

***

In short, making *Johnson* retroactive would also make retroactive any subsequent invalidation of a state penal statute for vagueness. *Montgomery* would incorporate that retroactivity into state post-conviction relief systems, so many more prisoners could collaterally attack their otherwise final convictions and sentences. The result would be a vulnerability of many final state convictions unaccompanied by vindication of any substantive protected liberty interest. There is no compelling reason to impose such disruption on state criminal justice systems.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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In the

Supreme Court of the United States

GREGORY WELCH,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF SCHOLARS OF FEDERAL COURTS AND SENTENCING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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SUMMARY OF ARGUMENT

Prior to the Court's decision in *Johnson v. United States*[2] prisoners whose sentences depended on the "residual clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), were subjected to a mandatory *minimum* term of imprisonment of 15 years. Under *Johnson*, the lawful statutory *maximum* sentence for their offense is 10 years. *Johnson* thus fundamentally altered both the punishment applicable to a class of defendants—defendants whose sentences depended on ACCA's residual clause—and the elements of a criminal offense.

Under *Teague v. Lane*[3] and its progeny, the rule announced in *Johnson* applies retroactively. *Teague*'s intellectual underpinnings confirm as much. *Teague* explicitly adopted Justice Harlan's framework for determining whether new constitutional rules apply retroactively. *See Teague*, 489 U.S. at 292 ("[W]e adopt Justice Harlan's approach to retroactivity for cases on collateral review."). And the Court has continued to look to Justice Harlan's writings for guidance in cases regarding the retroactive application of new constitutional rules. *See, e.g.*, *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718, 729 (2016) (invoking Justice Harlan's writings on retroactivity); *id.* at 735 (same); *id.* at 742 (Scalia, J., dissenting) (same). A fuller analysis of Justice Harlan's writings on retroactivity thus provides some direction on the kinds of rules that should apply retroactively under *Teague*. And that analysis reveals that Justice Harlan maintained that a constitutional decision facially invalidating a criminal statute—such as *Johnson*—was a "clear" instance where finality interests would yield and the new decision would apply retroactively. *Mackey v.*

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[2] 135 S. Ct. 2551 (2015).

[3] 489 U.S. 288 (1989).

United States, 401 U.S. 667, 692-93 (1971) (Harlan, J., dissenting).

Teague and subsequent cases later generalized Justice Harlan's exception to mean that new constitutional rules apply retroactively where they are substantive. The Court has since clarified that substantive rules include rules that alter the "punishment that the law can[] impose upon" a prisoner, as well as rules that "modif[y] the elements of an offense." *Schriro v. Summerlin*, 542 U.S. 348, 352, 354 (2004). *Johnson* does both. Further, retroactivity doctrine has also always been attuned to "equitable and prudential considerations," *Danforth v. Minnesota*, 552 U.S. 264, 278 & n.15 (2008), such as the real-world effects of mandatory minimums, which mechanically result in additional lengthy terms of imprisonment. And declining to apply *Johnson* retroactively would deny prisoners a remedy for the substantial deprivation of liberty that resulted from the misapplication of a mandatory minimum sentence that exceeds the lawful statutory maximum established by Congress. It would also undermine the principle that criminal punishments are established by the legislature, and not the judiciary. *See Whalen v. United States*, 445 U.S. 684, 689 (1980) ("[T]he power to prescribe the punishments to be imposed upon those found guilty resides wholly with the Congress.").

Petitioner may also be entitled to the benefit of the new rule announced in *Johnson* because *Teague*'s retroactivity bar should not even apply to collateral challenges to federal sentences. *Teague* established a general bar against federal courts retroactively applying new constitutional rules against States in order to accommodate the "interests of comity and finality." 489 U.S. at 308. These considerations, which must "be considered in determining the proper scope of habeas review," *id.*, arguably do not justify applying a bar against retroactive application of new

constitutional rules in collateral challenges to federal sentences. Collateral challenges to federal, as opposed to state, judgments do not implicate comity and federalism, and finality is much less of a concern where a prisoner challenges a sentence, rather than a conviction.

Each of these reasons independently suffices to reverse the court of appeals decision denying a certificate of appealability in this case. If *Teague*'s retroactivity bar applies to collateral challenges to federal sentences, then the rule announced in *Johnson* applies retroactively under *Teague* (either because it qualifies as an "exception" to *Teague*'s retroactivity bar, or because it was not subject to the bar in the first place).[4] If *Teague*'s bar against retroactive application of new constitutional rules does not apply to collateral challenges to federal sentences, however, then Petitioner is entitled to the benefit of the new rule announced in *Johnson*.

The Court need not decide the second question—whether *Teague*'s retroactivity bar applies to collateral challenges to federal sentences—until the issue is fully briefed in a future case. The looming statute of limitations makes it unrealistic to ask for additional briefing and thus allow for full consideration of this question. Prisoners have one year from the date on which *Johnson* was decided (June 26, 2015) to file a successive petition for post-conviction review. 28 U.S.C. § 2244(d)(1) (2012); § 2255(f)(3). The Court therefore must apply *Johnson* to a case on collateral review before the end of this Term in order to ensure that

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[4] *Cf. Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718, 728 (2016) ("Although *Teague* describes new substantive rules as an exception to the bar on retroactive application of procedural rules, this Court has recognized that substantive rules 'are more accurately characterized as ... not subject to the bar.'" (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352 n.4 (2004)).

successive petitions are not time-barred. *See Dodd v. United States*, 545 U.S. 353, 359 (2005) ("[A]n applicant who files a second or successive motion seeking to take advantage of a new rule of constitutional law will be time barred except in the rare case in which th[e] Court announces a new rule of constitutional law and makes it retroactive within one year."). Because the rule announced in *Johnson* applies retroactively under *Teague*, the Court may rule for Petitioner while assuming, without deciding, that *Teague* applies to collateral challenges to federal sentences.[5]

Finally, applying *Johnson* to cases on collateral review would not unduly burden the federal courts. District courts have processed and modified the sentences of tens of thousands of offenders under 2007 and 2010 retroactive amendments to the federal sentencing guidelines.[6] Significantly fewer prisoners were sentenced under ACCA's residual clause. Many of these prisoners also will not require full resentencings, and the resentencings that have occurred to date confirm that the process will be both swift and seamless. The relevant fact-finding—the defendant's criminal history—has usually been conducted, and official and readily accessible documents will indicate both a defendant's offense of conviction as well as any applicable mandatory minimums.

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[5] *Cf. e.g.*, *Chaidez v. United States*, __ U.S. __, 133 S. Ct. 1103, 1113 n.16 (2013) (noting without deciding question).

[6] *See infra* Part III.

ARGUMENT

I. *TEAGUE*'S ORIGINS AND SUBSEQUENT APPLICATIONS CONFIRM THAT *JOHNSON* APPLIES RETROACTIVELY

The Court has repeatedly confirmed that Justice Harlan's writings form the underpinnings of *Teague*. *See, e.g.*, *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718, 729 (2016); *Teague*, 489 U.S. at 292 ("[W]e adopt Justice Harlan's approach to retroactivity for cases on collateral review."). The Court has accordingly looked to Justice Harlan's writings for guidance as it has defined the contours of retroactivity doctrine. *See, e.g.*, *Montgomery*, 136 S. Ct. at 732 (citing Justice Harlan for the proposition that "the retroactive application of substantive rules does not implicate a State's interests in finality" (citing *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., dissenting)); *id.* at 735 (citing Justice Harlan for the proposition that "[s]ome rules may have both procedural and substantive ramifications" (quoting *Mackey*, 401 U.S. at 692 n.1 (Harlan, J., dissenting)); *id.* at 742 (Scalia, J., dissenting) (relying on "*Teague*'s first exception ... as initially conceived by Justice Harlan"). Because *Teague* adopted Justice Harlan's framework for retroactivity, an analysis of Justice Harlan's writings on retroactivity provides some evidence about the kinds of rules that apply retroactively under *Teague*, including the rule at issue in this case, *Johnson*. Justice Harlan envisioned that a rule like *Johnson*, which invalidated a criminal statute on federal constitutional grounds, would apply retroactively.

Moreover, in subsequent decisions applying *Teague*, the Court has clarified that new "substantive" rules are not subject to *Teague*'s retroactivity bar.[7] The rule announced in

[7] *Schriro*, 542 U.S. at 351.

Johnson has all of the hallmarks of a substantive rule that the Court has identified: It altered the lawful statutory sentencing range for a crime, thus changing the "punishment that the law can[] impose upon" a prisoner,[8] and it changed an "element of a[] [criminal] offense"—the conditions under which a defendant may be subjected to a mandatory minimum sentence.[9] *See generally* Leah M. Litman, *Residual Impact: Resentencing Implications Of* Johnson's *Potential Ruling On ACCA's Constitutionality*, 115 Colum. L. Rev Sidebar 55, 60-63, 65-73 (2015); Leah M. Litman, *Resentencing In The Shadow Of* Johnson v. United States, 28 Fed. Sen'g Rep. 45, 47-49 (2015).

Finally, the result of the decision in *Johnson* is that some prisoners are serving sentences that exceed the lawful statutory maximum for their offense. It would offend fundamental notions of fairness to decline to apply such a rule retroactively. Applying *Johnson* retroactively would ensure that prisoners have a remedy for a substantial deprivation of liberty—a mandatory additional term of imprisonment of 5 years. Doing so would also recognize the real-world and substantive effects that mandatory minimums have. And applying *Johnson* retroactively would respect the basic principle that criminal punishments are established by the legislature, not the judiciary. Accordingly, the Court should hold that the rule announced in *Johnson*—that ACCA's residual clause is unconstitutional—applies retroactively under *Teague*.

A. Justice Harlan Maintained That Decisions Invalidating Criminal Statutes Would Apply Retroactively

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[8] *Id.* at 352.

[9] *Id.* at 354.

Justice Harlan's writings on retroactivity, which the Court adopted in *Teague*, envisioned that constitutional rules invalidating criminal statutes would apply retroactively. Justice Harlan maintained that post-conviction review "has historically been available for attacking convictions" based on "[n]ew 'substantive" rules.[10] And Justice Harlan defined substantive rules as decisions regarding "the constitutionality of the federal or state statute under which [a defendant] had been convicted,"[11] including rules "that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."[12] The Court has already recognized that Justice Harlan's retroactivity exception for substantive rules "cover[s] not only rules forbidding criminal punishment of certain criminal conduct" "but also rules prohibiting a certain category of punishment."[13] Justice Harlan's exception for substantive rules includes ***all*** rules invalidating criminal statutes, not merely those declaring that Congress may not prohibit certain conduct. And because *Johnson* declared unconstitutional a criminal statute, it is precisely the type of rule that Justice Harlan believed should be retroactive.

Justice Harlan explicitly incorporated into his definition of "substantive rules" the discussion in an article by Professor Anthony Amsterdam, which maintained that "[a] claim that the movant pleaded guilty to a crime under a statute unconstitutional 'on its face' offends none of the

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[10] *Mackey* 401 U.S. at 692-93 (Harlan, J., dissenting).

[11] *Id.* at 684 (internal citations and quotations omitted); *see Desist v. United States*, 394 U.S. 244, 261 n.2 (1969) (Harlan, J., dissenting).

[12] *Mackey*, 401 U.S. at 692 (Harlan, J., dissenting).

[13] *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718, 729 (2016) (internal citations and quotations omitted).

finality elements significantly."[14] Professor Amsterdam also showed that "the Supreme Court has consistently entertained federal prisoners' collateral challenges to the 'fac[ial]' constitutionality of the underlying criminal statute."[15] The cases cited by Professor Amsterdam were not exclusively concerned with claims that Congress lacked the constitutional power to prohibit or penalize certain conduct.[16] For example, Professor Amsterdam listed *In re Gregory*, 219 U.S. 210, 214 (1911), a case which involved a due process challenge that certain statutory terms were "so uncertain to make the [statute] nugatory,"[17] as the kind of claim that, when raised in a collateral challenge, did not implicate interests in finality.[18] Professor Amsterdam also identified other due process challenges as the kinds of claims that did not implicate interests in finality.[19] And Justice Harlan agreed with Professor Amsterdam's assessment. After citing Professor Amsterdam's article, Justice Harlan stated that "such" claims—facial challenges to criminal statutes—"represent[] the clearest instance where finality interests should yield."[20]

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[14] Anthony Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Penn. L. Rev. 378, 384 (1964).

[15] *Id.* at 384 n.30.

[16] Cases Professor Amsterdam listed include *The Ku Klux Cases*, 110 U.S. 651, 654 (1884) (constitutional challenge to criminal statute); *Ex parte Curtis*, 106 U.S. 371 (1882) (same); and *Ex parte Siebold*, 100 U.S. 371, 374 (1879). *See* Amsterdam, *supra*, at 384 n.30.

[17] 219 U.S. 210, 214 (1911).

[18] Amsterdam, *supra*, at 384 n.30.

[19] *Id.* (citing *Baender v. Barnett*, 255 U.S. 224, 225 (1921), which rejected a due-process challenge by interpreting the statute to prohibit only "willing and conscious possession").

[20] *Mackey*, 401 U.S. at 692-93 (Harlan, J., dissenting).

The Court has also rejected the notion that substantive rules are limited to rules holding that the Constitution forbids Congress from criminalizing certain conduct or from prescribing certain punishments. For example, *Bousley v. United States*, 523 U.S. 614 (1998), held that a decision which narrowed the scope of 18 U.S.C. § 924(c)(1), so that it did not prohibit certain kinds of firearm possession, was substantive and retroactive.[21] Congress could have later amended the statute to prohibit those forms of possession, and it did in fact do so.[22]

The rule announced in *Johnson* is no less substantive because it involves a mandatory minimum sentence. The writ of habeas corpus has traditionally been available where a prisoner's sentence is unlawful, even if the underlying conviction is not. *See In re Medley*, 134 U.S. 160, 171 (1890) (granting writ of habeas corpus where sentence to solitary confinement violated ex post facto clause); *In re Bonner*, 151 U.S. 242 (1894) (granting writ of habeas corpus where prisoner was unlawfully sentenced to serve time in state penitentiary); *cf. Montgomery*, __ U.S. __, 136 S. Ct. at 731 (explaining that "the same [retroactivity] logic governs a challenge to a punishment," such as where "the sentence was one the court could not lawfully impose" (internal citations and quotations omitted)). Nor is *Johnson* any less substantive because it held ACCA's residual clause unconstitutional, rather than interpreting its terms.[23] Whether the Court has

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[21] 523 U.S. 614, 620-21 (1998) (applying *Bailey v. United States*, 516 U.S. 137 (1995) retroactively).

[22] *United States v. O'Brien*, 560 U.S. 218, 233 (2010) (noting congressional amendment "was colloquially known as the 'Bailey Fix Act'").

[23] *See* Litman, *Resentencing In The Shadow*, *supra*, at 47; Leah Litman, *What Does* Montgomery v. Louisiana *Mean For Johnson Retroactivity?*, Casetext (Jan. 27, 2016), https://casetext.com/posts/what-does-montgomery-v-louisiana-

interpreted ACCA's terms or held them unconstitutional, the resulting decision will "*necessarily* carry a significant risk" that a particular class of defendants has received unlawful sentences. *Schriro*, 542 U.S. at 352 (emphasis added). That is the defining characteristic of a substantive rule.[24]

Johnson therefore announced precisely the kind of rule that Justice Harlan maintained would be retroactive: a decision invalidating a statute on due process—and specifically vagueness—grounds. *Johnson* held that ACCA's residual clause was "unconstitutional 'on its face.'"[25]

B. Johnson *Applies Retroactively Because It Altered What Punishment The Law May Impose and The Elements of A Criminal Offense*

The Court's subsequent retroactivity cases, which have built on Justice Harlan's framework, further establish why the rule announced in *Johnson* applies retroactively. The Court has made clear that rules either changing the "punishment that the law can[] impose upon" a defendant or altering an "element of a[] [criminal] offense" are substantive and therefore retroactive. *Schriro*, 542 U.S. at 352, 354. *Johnson* did both.

First, *Johnson* altered the punishment that the law can impose on defendants whose ACCA sentences depended on

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mean-for-johnson-retroactivity ("[I]t strains imagination to think that a rule is less 'substantive' if it holds that a statute is facially unconstitutional rather than interpreting the statute's terms. The effect of both kinds of rules is the same.").

[24] *See Schriro*, 542 U.S. at 352 (listing rules in this category).

[25] Amsterdam, *supra*, at 384 n.30; *see Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015) ("[A]n increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process.").

the residual clause. The decision reduced these defendants' statutory *maximum* term of imprisonment to 10 years, when previously they were subject to a statutory *minimum* term of 15 years. *Compare* 18 U.S.C. § 924(e), *with* 18 U.S.C. § 924(a)(2). Johnson thus changed the statutory sentencing range for a class of defendants, resulting in some prisoners facing "'a punishment that the law cannot impose upon' them—a term of years exceeding the statutory maximum for the offense they were convicted of."[26] A rule is substantive when it "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense." *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), abrogated on other grounds, *Atkins v. Virginia*, 536 U.S. 304 (2002). *Johnson* did just that for defendants whose sentences depended on ACCA's residual clause.

Second, by invalidating the residual clause, *Johnson* changed the elements of a criminal offense—the conditions that subject a defendant to ACCA's 15-year mandatory minimum sentence. The Court has said repeatedly that "any fact that increases the mandatory minimum" sentence is an "element" of a criminal offense.[27] Before *Johnson*, prisoners with three or more convictions for felonies that were found to "otherwise involve conduct that presents a serious potential risk of physical injury to another" were subjected to ACCA's 15-year mandatory minimum sentence.[28] After *Johnson* they are not.[29] And because the residual clause "restricted the

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[26] Litman, *Residual Impact*, *supra*, at 61 (quoting *Schriro*, 542 U.S. at 352).

[27] *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013); *see Hurst v. Florida*, __ U.S. __, 136 S. Ct. 616, 621 (2016).

[28] 18 U.S.C. § 924(e)(2)(B)(ii).

[29] *See* 135 S. Ct. at 2563 ("[I]mposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process.").

class of defendants" eligible for ACCA's mandatory minimum, it "*effectively w[as]* [an] element[]" of a criminal offense.[30] This is precisely the kind of rule the Court has declared is "normally substantive."[31] Indeed, prior to *Johnson*, *every* court of appeals opinion addressing the question held that decisions narrowing ACCA's scope, such as *Begay v. United States*,[32] and *Chambers v. United States*,[33] were substantive.[34] The rule in *Johnson* is no less substantive because it narrowed ACCA's scope by invalidating the residual clause, as opposed to interpreting its terms. *See* Litman, *Resentencing In The Shadow*, *supra*, at 47 ("It is hard to see how a decision 'interpreting' ACCA's scope would be substantive, but a decision invalidating ACCA's residual clause—which also alters ACCA's scope—would not be. Both kinds of decisions modify the elements of an offense and alter a defendant's eligibility for a 15-year term of imprisonment.").

Accordingly, as a new substantive rule, *Johnson*'s holding is not subject to *Teague*'s retroactivity bar.

C. *The Unlawful Sentences That Resulted From* Johnson *Underscore The Need For Its Retroactive Application*

As a result of *Johnson*, some defendants received—and are currently serving—sentences that exceed the lawful statutory maximum for their offense of conviction. *See supra* Part I.B. This is because *Johnson* did more than invalidate a mandatory minimum sentence. The decision invalidated a

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[30] *See Schriro*, 542 U.S. at 354.

[31] *Id.*

[32] 553 U.S. 137 (2008).

[33] 555 U.S. 122 (2009).

[34] Litman, *Residual Impact*, *supra*, at 63 & n.43 (collecting cases).

statute—ACCA's residual clause—that imposed a mandatory minimum term of imprisonment (15 years) that exceeded the otherwise lawful statutory maximum sentence (10 years) for a defendant's crime. *See* Litman, *Residual Impact*, *supra*, at 61 ("Without the ACCA enhancement, the statutory maximum term of imprisonment for a conviction under § 922(g) is ten years, whereas with the enhancement, the statutory mandatory minimum term of imprisonment is fifteen years."). And declining to apply the rule announced in *Johnson* retroactively would offend fundamental notions of fairness by denying prisoners a remedy for that substantial deprivation of liberty—the mandatory, additional 5-year term of imprisonment that resulted from the application of an unlawful mandatory minimum sentence. Refusing a remedy to these prisoners would also threaten the basic principle that criminal punishment is established by the legislature rather than the judiciary.

Johnson's holding means that every prisoner whose ACCA sentence depended on the residual clause received an unlawfully high sentence.[35] *See* Litman, *Resentencing In The Shadow*, *supra*, at 47 ("*Johnson* therefore means that defendants sentenced under ACCA's residual clause received ... a term of years exceeding the statutory maximum for their offense of conviction."). Applying *Johnson* retroactively would, consistent with basic notions of fairness, ensure that these prisoners have a remedy for the substantial deprivation

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[35] Not all statutory mandatory minimums alter a defendant's statutory maximum sentence. For example, 21 U.S.C. § 841(b)(1)(A) establishes that the statutory maximum sentence for a violation of 21 U.S.C. § 841(a) is life imprisonment, but § 841(b)(1)(A) also imposes a series of mandatory minimum sentences for particular defendants. These mandatory minimums result in additional years of imprisonment, but decisions invalidating these mandatory minimums may not result in defendants receiving sentences that exceed the statutory maximum for their offense of conviction.

of liberty that resulted from the misapplication of ACCA's mandatory minimum sentence—an additional mandatory five-year term of imprisonment. *See* Litman, *Residual Impact*, *supra*, at 61 ("The ACCA enhancement require[d] additional years of imprisonment [which] result[ed] in a real substantive liability.").

Applying *Johnson* retroactively would also recognize the real-world effects of mandatory minimum sentences.[36]

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[36] Even under ordinary circumstances, statutory mandatory minimums are "fundamentally inconsistent" with "a fair, honest, and rational sentencing system." *Harris v. United States*, 536 U.S. 545, 570 (2002) (Breyer, J., concurring); *id.* at 570-71 (mandatory minimums "rarely reflect an effort to achieve sentencing proportionality"). Numerous judges have expressed discomfort with statutory minimum sentences that require judges to impose excessive and unfair terms of imprisonment that do not reflect defendants' culpability or likelihood of reoffending, or serve any other legitimate penological purpose. *See United States v. Acoff*, 634 F.3d 200, 205 (2d Cir. 2011) (Lynch, J., concurring) (lamenting how mandatory minimums "require that courts impose unfair and unreasonable sentences"); *see also* Judge Paul Cassell, Statement on behalf of the Judicial Conference of the United States Before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security (June 2007), reprinted in 19 Fed. Sent. R. 344, 344 (2007). Mandatory minimums also undermine sentencing values such as proportionality and uniformity by providing prosecutors with substantial discretion and leverage in plea bargaining negotiations. Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 Yale L.J. 1909, 1962-64 (1992); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 Harv. L. Rev. 2548 (2004); *see* United States Sentencing Commission Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (2011) 136, available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_07.pdf [hereinafter USSC Report, Chapter 7] (noting evidence that suggests mandatory minimum sentences influence plea bargaining decisions). Statutory minimum

See id. The average federal criminal sentence for offenders who receive mandatory minimum sentences is 139 months, whereas the average sentence for offenders who obtain relief from otherwise applicable mandatory minimums is 63 months. Meanwhile, the average sentence for all offenders is 48 months.[37] The substantive effects of mandatory minimums are also disproportionality felt by black and Hispanic offenders.[38]

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sentences "transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring and .... reintroduce[] ... sentencing disparity." *Harris*, 536 U.S. at 571 (Breyer, J., concurring); *see also* Speech At The American Bar Association, An Address by Anthony M. Kennedy (Aug. 9, 2003), available at http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_08-09-03 ("[F]ederal mandatory minimum statutes ... give[] the decision to an assistant prosecutor."); American Bar Association Justice Kennedy Commission, Reports With Recommendations to the ABA House of Delegates 59 (Aug. 2004), available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_kennedy_JusticeKennedyCommissionReportsFinal.authcheckdam.pdf.

[37] USSC Report, Chapter 7, at 136.

[38] Hispanic and black offenders receive mandatory minimum sentences at higher rates than white offenders (38.3% to 31.5% to 27.4%), and black offenders obtain relief from mandatory minimum sentences at lower rates than other offenders (34.9% to 58.9%). United States Sentencing Commission, Quick Facts: Mandatory Minimum Penalties, available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY14.pdf. ACCA is no exception in this respect. U.S. Sentencing Comm'n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 292 (2011), available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_09.pdf (Hispanic offenders were subject to ACCA's mandatory minimum in 87.1% of cases where offender

The practical realities of mandatory minimum sentences should be reflected in the Court's retroactivity doctrine. The number of mandatory minimums has more than doubled since 1991,[39] and excluding immigration offenses, the percentage of federal prisoners who are convicted under statutes carrying mandatory minimum penalties has increased from 27.8% in 1991 to 39.9% in 2010.[40] An increasing percentage of federal prisoners are also convicted of statutes with mandatory minimum penalties of ten or more years.[41] There is no reason to insulate federal mandatory minimums from otherwise applicable principles of retroactivity.

Because the result of *Johnson* is that some prisoners are serving more than the lawful statutory maximum that Congress authorized for their offense, applying *Johnson* retroactively would also respect the principle that "the power of punishment is vested in the legislative, not in the judicial department." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). This principle would be implicated in any case about the retroactivity of a decision that changed the requirements for a mandatory minimum sentence. But it is doubly relevant here, where *Johnson*'s holding means that federal prisoners are currently serving terms of imprisonment

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qualified for ACCA, compared to 83.0% for black offenders and 81.6% for white offenders); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing And Racial Disparity: Assessing The Role Of Prosecutors And The Effects of Booker*, 123 Yale L.J. 2, 27-38 (2013).

[39] United States Sentencing Commission Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (2011) 71, available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_04.pdf.

[40] *Id.* at 82-83.

[41] *Id.* at 75, 83.

that exceed the statutory maximum for their offense because federal courts misapplied ACCA's mandatory minimum sentence. *See United States v. DiFrancesco*, 449 U.S. 117, 139 (1980) ("[A] defendant may not receive a greater sentence than the legislature has authorized.").

II. COMITY AND FINALITY ARGUABLY DO NOT JUSTIFY A BAR AGAINST RETROACTIVE APPLICATION OF *JOHNSON*

Teague noted that "comity and finality must be . . . considered in determining the proper scope of habeas review." 489 U.S. at 308. And these concerns may not justify a bar against the retroactive application of new constitutional rules in collateral challenges to federal sentences. Comity, by definition, "describes the deference one sovereign is to afford the judgments of another." Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 Tul. L. Rev. 443, 456 (2007). Accordingly, comity is not implicated where a federal court hears a collateral challenge to a federal sentence being served by a federal defendant in federal prison.[42]

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[42] Finality interests are less weighty in federal collateral challenges to federal judgments than in federal collateral challenges to state judgments for other reasons as well. Unlike federal collateral challenges to state judgments, federal collateral challenges to federal judgments may be the first opportunity for litigants to raise certain constitutional claims. In federal collateral challenges to state judgments, federal courts review claims that have already been raised in at least one state proceeding. In the context of federal judgment challenges, however, federal courts review some claims that have never—and can never—be raised until that point in the litigation. For example, *Massaro v. United States* instructed litigants to raise ineffective-assistance of trial counsel claims in collateral proceedings, rather than on appeal. 538 U.S. 500, 508 (2003). Federal courts also typically do not adjudicate claims that prosecutors have withheld exculpatory evidence in violation of

Nor is the concern for finality significant where a prisoner challenges a sentence, rather than a conviction.[43] As the Court has explained in other contexts, there is a lowered expectation of finality with respect to sentences than with respect to convictions. *See United States v. DiFrancesco*, 449 U.S. 117, 134 (1980) ("Historically, the pronouncement of sentence has never carried the finality that attaches to an acquittal."). Resentencing also does not jeopardize many of the interests that finality serves. Resentencing preserves the finality interests that are associated with a criminal conviction. Resentencing defendants who were wrongfully subjected to mandatory minimum sentences may also improve the accuracy and reliability of sentencing determinations. And resentencing would not expend excessive judicial resources, especially compared to the costs of wrongfully incarcerating prisoners beyond their statutory maximum sentence.

A. Resentencing Preserves The Finality Interests That Are Associated With Convictions

A collateral challenge to a sentence does not disturb any of the finality interests that are associated with a defendant's underlying conviction. Defendants who have been convicted would remain convicted. Resentencing does not jeopardize the expenditure of resources that led to the defendant's conviction. Resentencing also does not remove

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Brady v. Maryland, 373 U.S. 83 (1963), until collateral proceedings, at least where the claim depends on evidence outside the record (which will often be the case). Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 Cornell L. Rev. 679, 727 n.226 (2007).

[43] Commentators have maintained that finality concerns vary according to the kind of claim a prisoner raises. *See* Amsterdam, *supra*, at 384; *supra* Part I.A (summarizing *Teague*'s origins).

whatever deterrent effect was achieved through the defendant's conviction. *Cf. Teague*, 489 U.S. at 309 ("Without finality, the criminal law is deprived of much of its deterrent effect.").[44] The traditional arguments for finality thus have much less force in the context of a collateral challenge to a sentence, rather than a conviction.

B. Resentencing Defendants Who Were Wrongfully Subjected To Mandatory Minimum Sentences Can Enhance Sentencing Accuracy and Reliability

Both judicial and scholarly discussions about the finality interests in the criminal justice system have consistently highlighted how concerns about finality are linked to concerns about accuracy and reliability. *See, e.g.*, *Teague*, 489 U.S. at 311-13 (stressing the importance of procedures that are critical to "accurate determination[s]" in defining reach of habeas review); *Stone v. Powell*, 428 U.S. 465, 491 n. 31 (1976) (suggesting that habeas review is most needed to "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty"); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 455-60 (1963) (arguing for collateral review where there was a "failure of process" such that a prior determination is unreliable). And where a defendant was wrongfully subjected to a mandatory minimum, resentencing can increase the accuracy and

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[44] Indeed, deterrence and the general willingness of all persons to obey the criminal law may be undermined when people perceive a system as unjust. *See* Jeffrey Fagan & Tracey Meares, *The Paradox of Punishment in Minority Communities*, 6 Ohio St. J. Crim. L. 173, 176-77 (2008). And studies have shown that perceptions of fairness depend on whether defendants are "offered meaningful access to further processes to correct mistakes." Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further "Interests Of Finality"*, 2013 Utah L. Rev. 561, 589-90.

reliability of sentencing, in part by allowing for the exercise of judicial discretion.

Resentencings raise fewer concerns than retrials with undermining the accuracy and reliability of the criminal justice system because resentencings, unlike retrials, do not involve a finder of fact re-determining a question of fact that was already resolved one way at the initial proceeding. *See generally* Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 Wake Forest J.L. & Pol'y 151, 166-69 (2004). Trials involve a fact-finder ascertaining what occurred in the past. Sentencing determinations, by contrast, also incorporate some forward-looking assessments. The primary federal statute governing sentencing determinations directs judges to impose sentences based on the need for (future) "deterrence;" the need to "protect the public" from (future) crimes; and the need to "provide the defendant with educational or vocational training, medical care, or other correctional treatment," also with an eye toward the future. 18 U.S.C. § 3553(a)(2)(B)-(D).

Additionally, because sentencing determinations incorporate forward-looking assessments, resentencing proceedings do not encounter the same problems with the "loss of evidence or absence or death of witnesses" that may occur in retrials. Bator, *supra*, at 517. Federal judges must take into account all relevant circumstances that exist at sentencing—including developments that happened after the defendant's commission of the offense—in order to properly discharge their statutory responsibilities. *See Pepper v. United States*, 562 U.S. 476, 492 (2011) ("A court's duty is always to sentence the defendant as he stands before the court on the day of sentencing."). And backward-looking evidence that is relevant to resentencing, such as a defendant's background, will have been preserved in the presentence report that was prepared for the defendant's

initial sentencing. Presentence reports contain information about the defendant's history and background up to the date the report was filed; they are also filed with the court and thus accessible on courts' dockets. *See infra* Part III (discussing requirements of presentence reports).

Moreover, the passage of time may actually increase the accuracy and reliability of sentencing determinations. *See* Berman, *supra*, at 166-69. At resentencing, the sentencing court can take into account additional information that was not available at the previous sentencing, such as the defendant's intervening behavior. *Jones v. State*, 414 Md. 686, 695 (2010). And, as the Court has stressed, "evidence of postsentencing rehabilitation may be highly relevant to several of the § 3553(a) factors that Congress has expressly instructed district courts to consider at sentencing." *Pepper*, 562 U.S. at 491.

Resentencing defendants who were wrongfully subjected to mandatory minimum sentences may also enhance the accuracy and reliability of sentencing determinations by allowing judges to exercise some discretion when imposing sentences. Paul Bator maintained that he could "imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else." Bator, *supra*, at 451. But where, as here, a prisoner was unlawfully subjected to a mandatory minimum sentence, the sentencing judge had no real opportunity to exercise discretion. Statutory mandatory minimums require judges to impose minimum sentences. They do not leave defendants' sentences within the discretion of sentencing courts, and thus do not allow sentencing judges to engage in the "difficult and subtle art of judging well"

what sentence would best effectuate the statutory goals of sentencing. *Id.*

C. Resentencing Does Not Require a Significant Expenditure of Resources

Resentencing imposes relatively few costs, especially compared to retrials. "[T]he cost of correcting a sentencing error is far less than the cost of a retrial." *United States v. Williams*, 399 F.3d 450, 456 (2d Cir. 2005). Sentencing proceedings are governed by significantly fewer rules than trials are.[45] And correcting the misapplication of a mandatory minimum sentence based on a defendant's prior convictions is particularly easy. A federal prisoner may be resentenced by the judge who presided over the prisoner's case and imposed the sentence. *See* 28 U.S.C. § 2255(a). In that proceeding, the judge may rely on prior records—such as the presentence report that categorized the prisoner as an armed career criminal—and adjust the prisoner's sentence accordingly. *See infra* Part III (discussing requirements of presentence reports).

Resentencing prisoners may actually conserve resources, compared to incarcerating those prisoners well beyond the statutory maximum sentence for their offense. ACCA imposed a mandatory minimum sentence of 15 years when the otherwise applicable statutory maximum sentence was 10 years—a difference of at least 5 years for prisoners whose sentences depended on the residual clause. The average cost of incarcerating a prisoner for one month in the United States is $2,500, or $30,000 per year. James J. Stephan, Bureau of Justice Statistics, U.S. Dep't of Justice,

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[45] *See, e.g.*, Alan Michaels, *Trial Rights at Sentencing*, 81 N.C. L. Rev. 1771 (2003); Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights At Sentencing*, 99 Cal. L. Rev. 47, 56-73 (2011).

State Prison Expenditures 2001, at 1 (2004). One legal scholar estimated that the average cost of resentencing a prisoner is less than $2,000. *See* Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further "Interests Of Finality"*, 2013 Utah L. Rev. 561, 599. In short, any resentencings that would result from the retroactive application of *Johnson* may, on balance, conserve resources—and would not implicate finality concerns generally associated with collateral review.

III. APPLYING *JOHNSON* TO CASES THAT HAVE BECOME FINAL WILL NOT UNDULY BURDEN THE FEDERAL COURTS

The federal criminal justice system has the capacity to effectively conduct resentencings in cases similar to Petitioner's. Applying *Johnson* retroactively will require new sentencings for some of the defendants sentenced under ACCA. The precise number is unclear because only those defendants whose ACCA sentences depended on the residual clause must be resentenced. ACCA imposes a 15-year mandatory minimum sentence if the defendant has three or more convictions for serious drug offenses or violent felonies.[46] *Johnson* invalidated the residual clause, which defined a violent felony to include any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another."[47] But *Johnson* left intact ACCA's enumerated-offense clause, which lists certain felonies as violent felonies, as well as the element-of-force clause, which defines a violent felony to include a felony that "has as an element the use, attempted use, or threatened use

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[46] 18 U.S.C. § 924(e)(1).

[47] 18 U.S.C. § 924(e)(2)(B)(ii).

of physical force against the person of another."[48] *See* Litman, *Resentencing In Shadow*, *supra*, at 45-46 (explaining argument and collecting cases finding that prisoners did not have *Johnson* claims). The number of defendants whose ACCA sentences depended on the residual clause is substantially fewer than 6,000. Litman, *Residual Impact*, *supra*, at 56 & nn. 6-7 (noting there are just over 6,000 federal prisoners who were sentenced under ACCA); Litman, *Resentencing In Shadow*, *supra*, at 45-46 (collecting cases where courts determined that prisoners sentenced under ACCA did not have *Johnson* claims); *infra* (same).

But not all of these prisoners will require full resentencings. Many prisoners with *Johnson* claims have already served their statutory maximum term of imprisonment. In these cases, courts will merely impose the 10-year statutory maximum term rather than determining a new term of imprisonment with some time still to be served.[49]

Two recent examples of retroactive Guideline amendments also provide a blueprint for how courts may effectively resentence defendants with *Johnson* claims. First, a 2007 Guideline amendment retroactively lowered the base offense level applicable to crack offenses. Federal courts received over 25,000 requests for sentence reductions based on that amendment and granted over 16,000 such requests.[50] "[T]his workload was managed surprisingly well" through

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[48]18 U.S.C. § 924(e)(2)(B).

[49]*See* Leah M. Litman, *The Extraordinary Circumstances Of* Johnson v. United States, 114 Mich. L. Rev. First Impressions 81, 88 & n.53 (2016) (noting several examples); *Lynch v. United States*, No. 03 Crim. 928(RMB), 2015 WL 9450873, at *2-3 (S.D.N.Y Dec. 8, 2015).

[50] Sentencing Guidelines for the United States Courts, 76 Fed. Reg. 41,332, 41,333-34 (July 13, 2011).

several procedures that were instituted by the Bureau of Prisons, courts, prosecutors, and defense attorneys.[51] For example, the Bureau of Prisons agreed to expand prisoner access to legal materials and legal counsel and to make presentence reports more readily available to inmates.[52]

Second, the Sentencing Commission also decided to make the Guideline amendment that implemented the Fair Sentencing Act of 2010 retroactive. When the Commission debated whether to make the amendment retroactive, it received testimony about how prior administrability concerns with retroactive Guideline amendments "have not come to

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[51] Testimony of Judge Reggie B. Walton Presented to the U.S. Sentencing Commission on June 1, 2011 on the Retroactivity of the Crack Cocaine Guideline Amendment, U.S. Sentencing Comm'n (June 1, 2011), at 3, http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_ Meetings/20110601/Testimony_Reggie_Walton.pdf; *see also* e.g., Testimony of James E. Felman on behalf of the Am. Bar Ass'n before the U.S. Sentencing Commission for the Hearing Regarding Retroactivity of Amendments Implementing The Fair Sentencing Act of 2010, U.S. Sentencing Comm'n (June 1, 2011), at 4, http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_ Meetings/20110601/Testimony_ABA_James_Felman.pdf.

[52] Statement of Thomas Kane to the U.S. Sentencing Commission on the Retroactivity of the Crack Cocaine Guideline Amendment (June 1, 2011), at 30-31, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Hearing_Transcript.pdf; Statement of Thomas R. Kane Presented to the U.S. Sentencing Commission on June 1, 2011 on the Retroactivity of the Crack Cocaine Guideline Amendment, U.S. Sentencing Comm'n (June 1, 2011), at 2-4, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Testimony_Thomas_Kane.pdf

pass."[53] Federal courts received over 13,000 requests for sentence reductions based on the 2010 Guideline amendment and granted over 7,000 of them.[54] Looking back on both the 2007 and 2010 resentencings, one federal judge surmised that "the Federal Judiciary has effectively managed . [the] retroactivity stemming from guideline amendments."[55]

Similar policies could be instituted here, where the number of prisoners who were sentenced under ACCA is significantly less than the number of prisoners who had potential resentencing claims under the 2007 or 2010 Guideline amendments. The mechanics of resentencings would also be very workable. Presentence reports (PSRs) already include defendants' criminal histories, and thus the essential factfinding has usually been completed. PSRs also

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[53] Testimony of Federal Public Defender Michael S. Nachmanoff before the U.S. Sentencing Commission for the Hearing Regarding Retroactivity of Amendments Implementing The Fair Sentencing Act of 2010, U.S. Sentencing Comm'n (June 1, 2011), at 65, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Hearing_Transcript.pdf; *see also* Testimony of Judge Reggie B. Walton Presented to the U.S. Sentencing Commission on June 1, 2011 on the Retroactivity of the Crack Cocaine Guideline Amendment, U.S. Sentencing Comm'n (June 1, 2011), at 3, http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110601/Testimony_Reggie_Walton.pdf.

[54] U.S. Sentencing Commission Final Crack Retroactivity Data Report Fair Sentencing Act tbl.3 (Dec. 2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final_USSC_Crack_Retro_Data_Report_FSA.pdf.

[55] Statement of Hon. Irene Keely, Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines (Nov. 5, 2015), at 30, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20151105/transcript.pdf.

must indicate the offense of conviction and any applicable mandatory minimum sentences, which are both potentially determinative factors at resentencing.[56]

Courts would still need to determine whether a defendant's ACCA sentence depended on the residual clause, but the limited data about the resentencings that have occurred thus far suggests the resentencing process should be both swift and seamless. Readily available materials, such as prior judicial writings and sentencing transcripts, may indicate which ACCA clause a defendant was sentenced under.[57] Courts also sometimes find PSRs sufficient to determine if a defendant's prior convictions qualify as ACCA predicates under the enumerated-offense or element-of-force

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[56] Office of Probation and Pretrial Services, The Presentence Investigation Report, Publication 107 III-32, Appendix E at 12 (Mar. 2006), https://www.fd.org/docs/select-topics---sentencing/the-presentence-investigation-report.pdf?sfvrsn=4 (directing PSRs to indicate applicability of mandatory minimum sentences).

[57] *E.g.*, *United States v. Whindleton*, 797 F.3d 105, 112 (1st Cir. 2015) ("[T]he district court concluded that Whindleton's ADW conviction qualified as a 'violent felony' under the ACCA's so-called 'Force Clause.'"); *United States v. Ozier*, 796 F.3d 597, 599 (6th Cir. 2015) ("At sentencing ... the district court ... concluded that defendant's prior convictions met ... [the] definition of 'burglary.'"); *United States v. Buckley*, No. 11-cr-82-wmc, 2015 WL 6443145, at *2 (W.D. Wisc. Oct. 22, 2015) ("[U]pholding the sentence on direct appeal, the Seventh Circuit ... found the ... statute .... requires as an element that force be directed against another."); *United States v. Dixon*, No. 2:12-cr-222-GMN-VCF, 2015 WL 5691215, at *2 (D. Nev. Sept. 28, 2015) (citing transcript as evidence that residual clause was "the basis" for defendant's ACCA sentence); *Jordan v. Butler*, No. 6:15-133-KKC, 2015 WL 5612274, at *3 (E.D. Ky. Sept. 23, 2015) ("[T]he trial court noted that Johnson's Tennessee conviction ... constituted a 'violent felony' because 'burglary' is one of the four enumerated offenses.").

clause.[58] A significant body of case law already spells out which offenses qualify as ACCA predicates under the enumerated-offense and element-of-force clauses, and courts have relied on these cases to quickly dispose of potential resentencing claims based on *Johnson*.[59] The United States'

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[58] *E.g.*, *Johnson v. United States*, No. 15-2214, 2015 WL 7274022, at *3 (C.D. Ill. Nov. 16, 2015); *Harris v. United States*, No. 1:15-CV-8016-LSC, 2015 WL 7075287, at *2 (N.D. Ala. Nov. 13, 2015); *Jackson v. United States*, No. 1:15CV00115, 2015 WL 6750807, at *18-19 (E.D. Mo. Nov. 5, 2015); *United States v. Hill*, No. 1:12-cr-0243, 2015 WL 6560632, at *7 (M.D. Pa. Oct. 29, 2015); *Brown v. United States*, No. 4:15-cv-646, 2015 WL 6125721, at *2 (N.D. Tex. Oct. 15, 2015); *Jackson v. United States*, No. CV 115-081, 2015 WL 5467957, at *3 (S.D. Ga. Sept. 17, 2015); *United States v. Broxton*, No. 5:12cr5, 2015 WL 5819662, at *2 (N.D. Fla. Aug. 27, 2015).

[59] *E.g.*, *United States v. Alexander*, 809 F.3d 1029, 1032 (8th Cir. 2016) (citing prior case holding conviction qualified as ACCA predicate under clause other than the residual clause); *United States v. Jean*, No. 15-11978, __ F. App'x __, 2016 WL 143361, at *3 (11th Cir. Jan. 13, 2016) (same); *United States v. Whindleton*, 797 F.3d 105, 112 (1st Cir. 2015) (same); *United States v. Hill*, 799 F.3d 1318, 1322-23 (11th Cir. 2015) (same); *United States v. Priddy*, 808 F.3d 676, 684 (6th Cir. 2015) (same); *United States v. Kemmerling*, 612 F. App'x 373, 376 (6th Cir. 2015) (same); *Brooks v. United States*, No. 3:12-cv-1266, 2016 WL 99485, at *18 (M.D. Fla. Jan. 8, 2016) (same); *Locklear v. United States*, No. 7:11-CR-00067, 2015 WL 9200439, at *2 (E.D. N.C. Dec. 16, 2015) (same); *United States v. Williams*, No. 3:04-cr-193, 2015 WL 9582828, at *3 (N.D. Tex. Dec. 1, 2015) (same); *Hairston v. United States*, No. 1:11CR313-1, 2015 WL 6553895, at *2 (M.D. N.C. Oct. 29, 2015); *Bohannon v. United States*, No. 13-1255, 2015 WL 6036614, at *4 (W.D. Tenn. Oct. 15, 2015) (same); *Pringle v. United States*, No. 3:15-cv-1455, 2015 WL 7566263, at *3 (N.D. Tex. Oct. 5, 2015) (same); *Thompson v. United States*, No. 1:12CV715, 2015 WL 5541326, at *4 (M.D. N.C. Sept. 18, 2015); *Lockhart v. United States*, __ F. Supp. 3d __, 2015 WL 5008607, at *3 (M.D. Fla. Aug. 20, 2015) (same); *Logan v. United States*, No. 1:12CV699, 2015 WL 5098613, at *1 (M.D. N.C. July 28, 2015) (same); *United States v. Nelson*, __ F.3d __, 2015 WL

filings have also helped to determine which defendants were sentenced under ACCA's residual clause, as well as which prior convictions still qualify as ACCA predicates.[60] There will also be few, if any, other disputes to resolve at resentencing because the United States is waiving procedural objections to resentencing prisoners whose ACCA sentences depended on the residual clause.[61]

CONCLUSION

The Court should rule that the rule in *Johnson* is substantive and retroactively applicable. Accordingly, the Eleventh Circuit's denial of a certificate of appealability should be reversed.

9583914, at *1 (11th Cir. Dec. 30, 2015) (citing prior case holding that conviction did not qualify as ACCA predicate under other ACCA provisions); *Watkins v. United States*, No. 1:15-CV-352-CLC, 2015 WL 9587712, at *3 (E.D. Tenn. Dec. 30, 2015) (same); *Carthorne v. United States*, No. 1:10CR96-1, 2015 WL 7430040, at *1 (M.D. N.C. Nov. 20, 2015) (same).

[60] *United States v. Cummings*, __ F. App'x __, 2016 WL 43762, at *1 (11th Cir. 2016) (per curiam) ("The government agrees that … [the predicate conviction] does not have 'as an element the use …. of physical force."); *United States v. Cook*, 624 F. App'x 723, at *1 (11th Cir. Dec. 3, 2015) (per curiam); *United States v. Dowlen*, 616 F. App'x 209, 210 & n.1 (6th Cir. Oct. 1, 2015) (per curiam) ("Dowlen's 2004 conviction for second-degree burglary no longer qualifies as an ACCA predicate offense, as the government concedes.").

[61] Litman, *Extraordinary Circumstances*, *supra*, at 88-89 & n.55 (providing examples); Leah Litman, *Circuit Splits & Original Writs*, Casetext (Dec. 17, 2015), available at https://casetext.com/posts/circuit-splits-original-writs (same).

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